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Part II

Department of Defense

Corps of Engineers, Department of the Army

33 CFR Parts 320 through 330

Regulatory Programs of the Corps of Engineers; Final Rule

DEPARTMENT OF DEFENSE
Corps of Engineers, Department of the Army

33 CFR Parts 320, 321, 322, 323, 324, 325, 326, 327, 328, 329 and 330

Final Rule for Regulatory Programs of the Corps of Engineers

AGENCY: Corps of Engineers, Army Department, DOD.

ACTION: Final rule.

SUMMARY: We are hereby issuing final regulations for the regulatory program of the Corps of Engineers. These regulations consolidate earlier final, interim final, and certain proposed regulations along with numerous changes resulting from the consideration of the public comments received. The major changes include modifications that provide for more efficient and effective management of the decision-making processes, clarifications and modifications of the enforcement procedures, modifications to the nationwide permit program, revision of the permit form, and implementation of special procedures for artificial reefs as required by the National Fishing Enhancement Act of 1984.

EFFECTIVE DATE: January 12, 1987.
FOR FURTHER INFORMATION CONTACT:

Mr. Sam Collinson or Mr. Bernie Goode, HQDA (DAEN-CWO-N), Washington, DC 20314—1000, (202) 272—0199.
SUPPLEMENTARY INFORMATION:

Consolidation of Corps Permit Regulations
These final regulations consolidate and complete the six following rulemaking events affecting the Corps regulatory program:

1. *Interim Final Regulations.* These regulations contained Parts 320—330 and were published (47 FR 31794) on July 22, 1982, to incorporate policy and procedural changes resulting from legislative, judicial, and administrative actions that had occurred since the previous final regulations had been published in 1977. Because it had been almost two years since we had proposed changes to the 1977 regulations, we published the 1982 regulations as "interim final" and asked for public comments. We received nearly 200 comments.

2. *Proposed Regulatory Reform Regulations.* On May *12,* 1983, we published (48 FR 21466) proposed revisions to the interim final regulations to implement the May 7, 1982, directives of the Presidential Task Force on Regulatory Relief. The Task Force directed the Army to reduce uncertainty and delay, give the states more authority and responsibility, reduce conflicting and overlapping policies, expand the use of general permits, and redefine and clarify the scope of the permit program. Since these regulations proposed changes to our existing nationwide permits and the addition of two new nationwide permits, a public hearing was held in Washington, DC, on October 12, 1983, to obtain comments on these proposed changes. As a result of the public comments received, nearly 500 in response to the proposed regulations and 22 at the public hearing, we have determined that some of the proposed revisions should be adopted and some should not. We have adopted some of the provisions that were designed to clarify policies for evaluating permit applications, to revise certain permit processing procedures, to add additional conditions to existing nationwide permits, and to modify certain nationwide permit procedures. We have not adopted some of the other proposed changes, including the two proposed new nationwide permits.

3. *Settlement Agreement Final Regulations.* On October 5, 1984, we published (49 FR 39478) final regulations to implement a settlement agreement reached in a suit filed by 16 environmental organizations in December of 1982 against the Department of the Army and the Environmental Protection Agency *(NWF* v. *Marsh)* concerning several provisions of the July 22, 1982, interim final regulations. The court approved the settlement agreement on February 10, 1984, and on March 29, 1984, we published (49 FR 12660) the implementing proposed regulations. We received over 150 comments on these proposed regulations covering a full range of views. Those comments which were applicable to the provisions of the March 29, 1984, proposals were considered and addressed in the final regulations published on October 5, 1984. The remaining comments have been considered in the development of the final regulations we are issuing today.

In the October 5, 1984, final rule there were several new provisions relating to the 404(b)(1) guidelines. In 33 CFR 320.4(a)(1) we clarified the fact that no 404 permit can be issued unless it complies with the 404(b)(1) guidelines.

If a proposed action complies with the guidelines, a permit will be issued unless the district engineer determines that it will be contrary to the public interest. In 33 CFR 323.6(a) we stated that district engineers will deny permits for discharges which fail to comply with the 404(b)(1) guidelines, unless the economic impact on navigation and anchorage necessitates permit issuance pursuant to section 404(b)(2) of the Clean Water Act. Although no 404 permit can be issued unless compliance with the 404(b)(1) guidelines is demonstrated (i.e., compliance is a prerequisite to issuance), the 404(b)(1) evaluation is conducted simultaneously with the public interest review set forth in 33 CFR 320.4(a).

4. *Proposed Permit Form Regulations.* On May 23, 1985, we published (50 FR 21311) proposed revisions to 33 CFR Part 325 (Appendix A), which contains the standard permit form used for the issuance of Corps permits and the related provisions concerning special conditions. This proposal provided for the complete revision of the permit form and its related provisions to make them easier for permittees to understand. General permit conditions were written in plain English and greatly reduced in number; unnecessary material was deleted; and material which is informational in nature was reformatted under a "FURTHER INFORMATION" heading. We received 18 comments on this proposal.

5. *Proposed Regulations to Implement the National Fishing Enhancement Act of 1984 (NFEA).* On July 26, 1985, we published (50 FR 30479) proposed regulations to implement a portion of the Corps regulatory responsibilities pursuant to the NFEA. Specialized procedures relative to the processing of Corps permits for artificial reefs were proposed for inclusion in Parts 322 and 325. Eight organizations commented on these proposed regulations, The NFEA also authorizes the Secretary of the Army to assess a civil penalty on any person who, after notice and an opportunity for a hearing, is found to have violated any provision of a permit issued for an artificial reef. Procedures for implementing such civil penalties will be proposed at a later date. In addition, we are hereby notifying potential applicants for artificial reef permits that the procedures contained in Part 323 relating to the discharge of dredged or fill materials and those in Part 324 relating to the transportation of dredged material for the purpose of dumping in ocean waters will be used in the processing of artificial reef permits when applicable.

6. *Proposed Regulations (Portion of Part 323 and All of Part 326.* On March 20, 1986, we published (51 FR 9691) a proposed change to 33 CFR 323.2(d), previously 323.2(j), to reflect the Army's policy regarding *de minimis* or incidental soil movements occurring

during normal dredging operations and a proposed, complete revision of the Corps of Engineers enforcement procedures (33 CFR Part 326). Seventeen comment letters were received on these proposed regulations. These comments and the resulting changes reflected in the final regulations for § 323.2(d) and Part 326 are discussed in detail below.

Environmental Documentation

We have determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Appropriate environmental documentation has been prepared for all permit decisions. Environmental assessments for each of the nationwide permits previously issued or being modified today are available from the Corps of Engineers. You may obtain these assessments by writing to the address listed in this preamble. Considering the potential impacts, we have determined that none required an environmental impact statement.

Discussion of Public Comments and Changes

Part 320—Genera/Regulatory Policies

Section 320.1(a) (6): In order to provide clarity to the public, we have added a provision to codify existing practice that when a district engineer makes certain determinations under these regulations, the public can rely on that determination as a Corps final agency action.

Section 320.3(o): The National Fishing Enhancement Act of 1984 has been added to the list of related laws in § 320.3.

Section 320.4: In the May 12, 1983. proposed rule and the March 29, 1984, proposed rule we proposed changes to § § 320.4(a)(1)—public interest review, 320.4(b)(5)—effect on wetlands, 320.4(c)—fish and wildlife, 320.4(g)—consideration of property ownership, and 320.4(j)—other Federal, state or local requirements. Changes to these paragraphs were adopted in the October 5, 1984, final rule. The various comments relating to these proposals have been fully discussed in the October 5, 1984 final rule (49 FR 39478).

Section 320.4 (a) (3): Many commenters objected, some strongly, to the deletion in the October 5, 1984, final regulations of the term "great weight" from § 320.4(c), the paragraph concerning the consideration of opinions expressed by fish and wildlife agencies. Many stated that fish and wildlife agencies had the expertise and knowledge to know the impact of work in wetlands; therefore, their opinions should be given strong consideration. Some commenters supported removal of the "great weight" statement expecting less value would be given fish and wildlife agency views. It is not our intention to reduce or discount the value or expertise of fish and wildlife agency comments or those of any other experts in any field. Comments also varied from support of to objection to the deletion of the "great weight" statement from the other policy statements such as energy and navigation in § 320.4. Therefore, we added a new paragraph (a)(3) to clarify our position on how we consider comments from the public, including those from persons or agencies with special expertise on particular factors in the public interest review.

Section 320.4 (b) (1): One commenter objected to the placement of the word "some" in this paragraph as a rewrite of E.O. 11990 which places no qualifier on "wetlands" indicating that all wetlands are vital. We have found through experience in administering the Section 404 permit program that wetlands vary in value. While some are vital areas, others have very little value; however, most are important. We recognize that "some wetlands are vital . . ." is being read by some people as "Some wetlands are important . . ." This was not our intent. To avoid this confusion we have revised this paragraph by deleting "some wetlands are vital areas . . ." and indicating that "most" wetlands are important.

Section 320.4(b)(2)(vi): We have included in the list of important wetlands those wetlands that are ground water discharge areas that maintain minimum baseflows important to aquatic resources. Scientific research now indicates that wetlands more often serve as discharge areas than recharge areas. Those discharge areas which are necessary to maintain a minimum baseflow necessary for the continued existence of aquatic plants and animals are recognized as important.

Section 320.4(b)(2)(viii): We have included in the list of important wetlands those which are unique in nature or scarce in quantity to the region or local area.

Section 320.4(d): We have revised this paragraph to clarify that impacts from both point source and non-point source pollution are considered in the Corps public interest review. However, section 208 of the Clean Water Act provides for control of non-point sources of pollution by the states.

Section 320.4 (j) (1): Clarifying language has been added to this section to eliminate confusion regarding denial procedures when another Federal, state, and/or local authorization or certification has been denied.

Section 320.4(p): Some commenters felt that environmental considerations should take precedence over other factors. Other commenters believed that guidance should be given as to who determines whether there are environmental benefits to a project. Many commenters indicated that the regulation does not define the possible range of environmental benefits that will be considered. Environmental benefits are determined by the district engineer and the district staff based on responses received from the general public, special interest groups, other government agencies and staff evaluation of the proposed activity. Defining the possible range of environmental benefits would be almost impossible to cover in the rules in sufficient detail, since circumstances vary considerably for each permit application. After considering all the comments we have decided to make the change as proposed on May 12, 1983.

Section 320.4(q): Some commenters believed that this rule would distort review criteria by inserting inappropriate economic assumptions and minimizing environmental criteria. Some commenters suggested that the Corps revise this paragraph to include a provision to challenge an applicant's economic data and that of governmental agencies as well. Other commenters believe that economic factors do not belong in these regulations since the intent of the Clean Water Act is: "to restore and maintain the chemical, physical, and biological integrity of the nation's waters"; therefore, any regulation under the CWA should have, as its primary objective, provisions which give environmental factors the greatest weight. They were concerned that this part may be applied to allow economic benefits to offset negative environmental effects. Some' commenters, however, believed that the Corps should assume that projects proposed by state and local governmental interests and private industry are economically viable and are needed in the marketplace. They also believed that the Corps and other governmental agencies should not engage in detailed economic evaluations. Economics has been included in the Corps list of public interest factors since 1970. However, there has never been a specific policy on economics in the regulations. The Corps generally accepts an applicant's determination that a proposed activity is needed and will be economically viable, but makes its own decision on whether

a project should occur in waters of the U.S. The district engineer may determine that the impacts of a proposed project on the public interest may require more than a cursory evaluation of the need for the project. The depth of the evaluation would depend on the significance of the impacts and in unusual circumstances could include an independent economic analysis. The Corps will balance the economic need for a project along with other factors of the public interest. Accordingly, § 320.4(q) has been modified from the proposed rule to provide that the district engineer may make an independent review of the need for a project from the perspective of the public interest.

Section 320.4(r): Many comments were offered as to the intent, scope and implementation of the proposed mitigation policy. Comments were almost equally divided between those who felt that the policy should be expanded and those that felt it should be more limited. The issues that were raised include: mitigation should not be used to outweigh negative public interest factors; mitigation should not be integrated into the public interest review; mitigation should be on-site to the maximum extent practicable; off-site mitigation extends the range of concerns beyond those required by Section 404. A wide range of views were expressed on our proposed mitigation policy, but virtually all commenters expressed need for a policy. The Corps has been requiring mitigation as permit conditions for many years based on our regulations and the 404(b)(1) guidelines. Because of the apparent confusion on this matter, we have decided to clarify our existing policy at 320.4(r).

The concept of "mitigation" is many-faceted, as reflected in the definition provided in the Council on (Environmental Quality (CEQ) NEPA regulations at 40 CFR 1508.20. Viewing "mitigation" in its broadest sense, practically any permit condition or best management practice designed to avoid or reduce adverse effects could be considered "mitigation." Mitigation considerations occur throughout the permit application review process and are conducted in consultation with state and Federal agencies responsible for fish and wildlife resources. District engineers will normally discuss modifications to minimize project impacts with applicants at pre-application meetings (held for large and potentially controversial projects) and during the processing of applications. As a result of these discussions, district engineers may condition permits to require minor project modifications, even though that project may satisfy all legal requirements and the public interest review test without those modifications.

For applications involving Section 404 authority, mitigation considerations are required as part of the Section 404(b)(1) guidelines analysis; permit conditions requiring mitigation must be added when necessary to ensure that a project complies with the guidelines. To emphasize this, we have included a footnote to § 320.4(r) regarding mitigation requirements for Section 404, Clean Water Act, permit actions. Some types of mitigation measures are enumerated in Subpart H of the guidelines. Other laws such as the Endangered Species Act may also lead to mitigation requirements in order to ensure that the proposal complies with the law. In addition to the mitigation developed in preapplication consultations and through application of the 404(b)(1) guidelines and other laws, these regulations provide for further mitigation should the public interest review so indicate.

One form of mitigation is "compensatory mitigation," defined at 40 CFR 1508.20(e) to mean "'compensating for the impact by replacing or providing substitute resources or environments." Federal and state natural resource agencies sometimes ask the Corps to require permit applicants to compensate for wetlands to be destroyed by permitted activities. Such compensatory mitigation might be provided by constructing or enhancing a wetland; by dedicating wetland acreage for public use; or by contributing to the construction, enhancement, acquisition or preservation of such "mitigation lands." Compensatory mitigation of this type is often referred to as "'off-site" mitigation. However, it can be provided either onsite or off-site. Such mitigation can be required by permit conditions only in compliance with 33 CFR 325.4, and specifically with 33 CFR 325.4(a)(3). In addition to those restrictions, the Corps has for many years declined to use, and does now decline to use, the public interest review to require permit applicants to provide compensatory mitigation unless that mitigation is required to ensure that an applicant's proposed activity is not contrary to the public interest. If an applicant refuses to provide compensatory mitigation which the district engineer determines to be necessary to ensure that the proposed activity is not contrary to the public interest, the permit must be denied. If an applicant voluntarily offers to provide compensatory mitigation in excess of the amount needed to find that the project is not contrary to the public interest, the district engineer can incorporate a permit condition to implement that mitigation at the applicant's request.

Part 321—Permits for Dams and Dikes in Navigable Waters of the United States

The Secretary of the Army delegated his authority under Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401 to the Assistant Secretary of the Army (Civil Works). The Assistant Secretary in turn delegated his authority under Section 9 for structures in intrastate navigable waters of the United States to the Chief of Engineers and his authorized representative. District engineers have been authorized in 33 CFR 325.8 to issue or deny permits for dams or dikes in intrastate navigable waters of the United States" under Section 9 of the Rivers and Harbors Act of 1899. This section of the regulation and § § 325.5(d) and 325.8(a) have been revised to reflect this delegation.

Part 322—Permits for Structures or Work in or Affecting Navigable Waters of the United States

Section 322.2(a): We have revised the term "'navigable waters of the United States" to reference 33 CFR Part 329 since it and all other terms relating to the geographic scope of the Section 10 program are defined at 33 CFR Part 329. *Section 322.2(b):* Commenters on the definition of structures indicated that several terms needed further amplification. It was suggested that the term "boom" be defined to exclude a float boom, as would be used in front of a spillway. The term was not redefined because those dams constructed in Section 10 waters do require a permit for a float boom. However, most dams in the United States are constructed in non-Section 10 waters and do not require a permit for a boom (floating or otherwise) unless it involves the discharge of dredged or fill material. It was suggested that the term "obstacle or obstruction" be modified to reinstitute the language from the July 19, 1977, final regulations. We have adopted the suggestion which will clarify our intent that obstacles or obstructions, whether permanent or not, do require a permit; it will also assist in jurisdictional decisions on enforcement. It was suggested that "boat docks" and ''"boat ramps" be included in the list of structures, since these are frequently proposed structures. These have been included. It was suggested that the term ""artificial gravel island" be added, as

Congress, by Section 4(e) of the Outer Continental Shelf Lands Act of 1953, extended the regulatory program to the Outer Continental Shelf, and specifically cited artificial islands as falling under Section 10 jurisdiction. This type of structure is also constructed on state lands within the territorial seas. Accordingly, artificial islands have been included.

Section 322.2(c): Two commenters discussed the definition of "'work"; one stated that it was too broad and the other that it should be expanded. The present definition of the term "'work" has remained unchanged for many years and has achieved general acceptance by the regulators and those requiring a permit. The present language has been retained.

Sections 322.2(f)(2) and 323.2 (n) (2): Both of these sections are concerned with the definition of general permits. Several commenters expressed support for the additional criteria contained in the May 12, 1983 proposed rule. Other commenters expressed concern that the proposed criteria were illegal. Some commenters believed that the proposal would amount to a delegation of the Section 404 program to the states, and that this is not a prerogative of the Corps of Engineers. Many commenters expressed serious concern that state programs were not comprehensive enough to properly represent the public interest review. Still others objected to the proposal because there were no assurances that the state approved projects themselves were '"similar in nature" or would have "minimal adverse environmental effects"; those objections extended to the proposal to assess the impacts of the differences in the State! Corps decisions. Some commenters suggested that an automatic "kick-out" provision, whereby concerned agencies could cause the Corps to require an individual application on a case-by-case basis, may provide sufficient safeguards for the proposal to go forward. Some commenters suggested that a preferred approach to reducing duplication would be for the Corps to express, in its regulations, direction for its districts to vigorously pursue joint processing, permit consolidation, pre-application consultation, joint applications, joint public notices and special area management planning. This change was proposed in 1983. At that time we believed that additional flexibility in the types of general permits which could be developed was necessary to effectively administer the regulatory program. Our experience since then has shown that the existing definitions of general permit at both of these sections is flexible enough to develop satisfactory general permits. Therefore we have decided not to adopt this proposed change. Because several definitions previously found in Part 323 have been moved to Part 328, § 323.2(n) has been redesignated § 323.2(h).

Section 322.2(g): This section adds the definition of the term "artificial reefs" from the National Fishing Enhancement Act and clarifies what activities or structures the term does not include. Two commenters suggested modifications, or clarifications, to this definition to ensure that old oil and gas production platforms can be considered for use as artificial reefs. We agree with their suggestion. The definition would include the use of some production platforms, either abandoned in place or relocated, as artificial reefs as long as they are evaluated and permitted as meeting the standards of Section 203 of the Act.

Section 322.2(h): This section was proposed to add the definition of the term "outer continental shelf" from the Outer Continental Shelf Lands Act (OCSLA). Two commenters suggested that the territorial sea off the Gulf Coast of Florida and Texas is greater than three nautical miles from the coast line. We have determined that this is not the case, and have decided not to include a definition of the term "outer continental shelf" in these regulations and to rely instead on the definition of this term that is already in the OCSLA.

Sections 322.3 (a) and 322.4: Activities which do not require a permit have been moved from § 322.3 and included in § 322.4. The limitation of the applicability of Section 154 of the Water Resource Development Act of 1976 in certain waterbodies has been deleted because no such limitation exists in that Act.

Section 322.5(b): This section addresses the policies and procedures for processing artificial reef applications. One commenter suggested that the opportunity for a general permit should not be precluded by this section. A general permit for artificial reefs is not precluded by this regulation change. Furthermore, the opportunity for the issuance of general permits may be enhanced with the implementation of the National Artificial Reef Plan by the Department of Commerce.

Section 322.5(b) (1): This section cites the standards established under section 203 of the National Fishing Enhancement Act. These standards are to be met in the siting and construction, and subsequent monitoring and managing, of artificial reefs. Two commenters insisted that these should be called goals or objectives, and several commenters said that more specific guidelines or criteria are needed to evaluate proposed artificial reefs against the standards or goals. Section 204 of the Act states that the Department of Commerce will develop a National Artificial Reef Plan which will be consistent with the standards established under Section 203, and will include criteria relating to siting, constructing, monitoring, and managing artificial reefs. Specification of such criteria in these rules would be inappropriate in view of the intent of Congress to have the Department of Commerce perform this function. The National Marine Fisheries Service (NMFS), acting for the Department of Commerce, has consulted with us in developing the National Artificial Reef Plan, and we will continue to consult with them to ensure permits are issued consistent with the criteria established in that plan. The Department of Commerce announced the availability of the National Artificial Reef Plan in the Federal Register on November 14, 1985.

The U.S. Coast Guard was particularly concerned that these rules be more specific with regard to information and criteria that will be used to ensure navigation safety and the prevention of navigational obstructions. Section 204 of the National Fishing Enhancement Act requires that the Department of Commerce consult the U.S. Coast Guard in the development of the National Artificial Reef Plan regarding the criteria to be established in the plan. One of the standards with which the criteria must be consistent is the prevention of unreasonable obstructions to navigation. In addition, the district engineer shall consult with any governmental agency or interested party, as appropriate, in issuing permits for artificial reefs. This includes preapplication consultation with the U.S. Coast Guard, and placing conditions in permits recommended by the U.S. Coast Guard to ensure navigational safety.

Section 322.5(b) (2) and (3): These sections state that the district engineer will consider the National Artificial Reef Plan, and that he will consult with governmental agencies and interested parties, as necessary, in evaluating a permit application. Two commenters supported this coordination. The NMFS requested notification of decisions to issue permits which either deviate from or comply with the plan. Paragraph (b)(2) requires the district engineer to notify the Department of Commerce of any need to deviate from the plan. In addition, the NMFS receives a monthly list of permit applications on which the

district engineer has taken final action. This should be sufficient notification for those permits which do not deviate from the plan.

Section 322.5(b)(4): Although some commenters strongly supported this section describing the liability of permittees authorized to build artificial reefs, several expressed concern that this provision was not clearly written or required specific criteria to assist the district engineer in determining financial liability. This paragraph has been rewritten to correspond closely with the wording in the National Fishing Enhancement Act, and examples of ways an applicant can demonstrate financial responsibility have been added.

Section 322.5(g,): We have revised this paragraph on canals and other artificial waterways by eliminating procedural-only provisions which are redundant with requirements in 33 CFR Parts 325 and 326.

Section 322.5(l): A new section on fairways and anchorage areas has been added. This section was formerly found at 33 CFR 209.135. We are moving this provision to consolidate all of the permit regulations on structures to this part. We will delete 33 CFR 209.135 by separate notice in the Federal Register.

Part 323—Permits for Discharges of Dredged or Fill Material Into Waters of the United States

Section 323.2: Several commenters supported moving the definitions relating to waters of the United States to a separate paragraph. As proposed on May 12, 1983, we have moved the term "waters of the United States" and all other terms related to the geographic scope of jurisdiction of Section 404 of the CWA to 33 CFR Part 328 which is titled "Definition of the Waters of the United States." We believe that, by setting these definitions apart in a separate and distinct Part of the regulation and including in that Part all of the definitions of terms associated with the scope of the Section 404 permit program, we are better able to clarify the scope of our jurisdiction. We have not changed any existing definitions nor added any definitions proposed on May 12, 1983. Comments related to these definitions are addressed in Part 328 below.

We have not changed the definition of fill material at § 323.2(e). However, the Corps has entered into a Memorandum of Agreement with the Environmental Protection Agency to better identify the difference between section 402 and section 404 discharges under the Clean Water Act.

Section 323.2(d)—Previously 323.2(j): The proposed modification of this paragraph states that "*de minimis* or incidental soil movement occurring during normal dredging operations" is not a "discharge of dredged material," the term defined by this paragraph.

Eight commenters raised concerns relating to this provision. Most of these supported the regulation of "*de minimis* or incidental soil movement occurring during normal dredging operations" in varying degrees. Two specifically expressed a belief that the fallback from dredging operations constituted a discharge within the intent of section 404 of the Clean Water Act. One of these stated that the proposed provision was contrary to a binding decision by the U. S. District Court for the Northern District of Ohio in *Reid* v. *Marsh*, No. C— 81—690 (N. D. Ohio, 1984). Another commenter objected to the provision on the basis that it would force states that perceived a need to regulate dredging operations to regulate such activities under their National Pollutant Discharge Elimination System authority. The recommendations of the above group of commenters included the regulation of dredging activities on an individual or general permit basis or on a selective basis that would take into account the scopes and anticipated effects of the projects involved. Two commenters expressed concern over the fact that discharge activities such as the sidecasting of dredged material might be considered "'soil movement" that was "incidental" to a "normal dredging operation." The final concern raised related to the list of dredging equipment cited as examples. This list was seen, alternatively, as too limited or as not limited enough in reference to the types of equipment that may be used in a "normal dredging operation." Four commenters supported the proposed provision as a reasonable interpretation of the section 404 authority of the Corps.

Section 404 clearly directs the Corps to regulate the *discharge* of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a ""discharge of dredged material," we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress. We have consistently provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under section 404. The purpose of dredging is to remove material from the water, not to discharge material into the water. Therefore, the fallback in a ""normal dredging operation" is incidental to the dredging operation and *de minimis* when compared to the overall quantities removed. If there are tests involved, we believe they should relate to the dredging operator's intent and the result of his dredging operations. If the intent is to remove material from the water and the results support this intent, then the activity involved must be considered as a "normal dredging operation" that is not subject to section 404.

Based on the above discussion, we have not adopted any of the recommendations relating to the revision or deletion of this provision for the purpose of bringing about the regulation of "normal dredging operations" in varying degrees. We have replaced the "or" between the words *"de minimis"* and "incidental" with a comma to more clearly reflect the fact that the incidental fallback from a "normal dredging operation" is considered to be *de minim/s* when compared to the overall quantities removed. In addition, we have deleted the examples of dredging equipment at the end of the proposed provision to make it clear that *de minim/s* or incidental soil movement occurring during *any* "normal dredging operation" is not a "'discharge of dredged material." However, we wish to also make it clear that this provision applies only to the incidental fallback occurring during '"normal dredging operations" and not to the disposal of the dredged material involved. If this material is disposed of in a water of the United States, by sidecasting or by other means, this disposal will be considered to be a "'discharge of dredged material" and will be subject to regulation under section 404.

Section 323.4: We have made some minor corrections to this section to be consistent with EPA's permit exemption regulations at 40 CFR Part 233.

Part 324—Ocean Disposal

Section 324.4(c): The language of this section on the EPA review process has been rewritten to clarify the procedures the district engineer will follow when the Regional Administrator advises that a proposed dumping activity does not comply with the criteria established pursuant to section 102(a) of the Marine Protection, Research and Sanctuaries Act (MPRSA), or the restrictions established pursuant to section 102(c) thereof, in accordance with the provisions of 40 CFR 225.2(b).

Part 325—Permit Processing

Several minor changes have been made in this part. These changes involve requesting additional information from

an applicant, providing for a reasonable comment period, combining permit documentation, and documenting issues of national importance.

Section 325.1(b): This section has been rewritten to clarify the pre-application consultation process for major permit applications. No significant changes have been made in the content of this section.

Section 325.1 (d) (1): One commenter on this content of applications paragraph asked that where, through experience, it has been found that specific items of additional information are routinely necessary for permit review, the district engineer should be allowed to develop supplemental information forms. Another observed that restricting production of local forms may inhibit joint permit application processes. If it becomes necessary to routinely request additional information, the Corps can change the application form, but that must be done at Corps headquarters with the approval of the Office of Management and Budget. This change does not place any additional restrictions on developing local forms. As is now the case, local forms may be developed for joint processing with a Federal or state agency.

Section 325.1(d)(8): This is a new section requiring an applicant to include provisions for siting, construction, monitoring and managing the artificial reef as part of his application for a permit. One commenter suggested that the criteria for accomplishing these activities must be completed in the National Artificial Reef Plan before establishment of such reefs can be encouraged. Another recommended that the regulation describe more specifically the information to be supplied by an applicant with regard to monitoring and maintaining an artificial reef. The plan includes general mechanisms and methodologies for monitoring the compliance of reefs with permit requirements, and managing the use of those reefs. It can be used as a guide for the information to be supplied by the permit applicant. Specific conditions for monitoring and managing, as well as for maintaining artificial reefs generally need to be site-specific and should be developed during permit processing.

The U.S. Coast Guard requested that they be provided copies of permit applications for artificial reefs, and that a permittee be required to notify the Coast Guard District Commander when reef construction begins and when it is completed so timely information can be included in notices to mariners. The district engineer may elect to consult with the Coast Guard, when appropriate, during the pre-application phase of the permit process. At any rate, the Coast Guard will receive public notices of permit applications, and may make recommendations to ensure navigational safety on a case-by-case basis. Appropriate conditions can be added to permits to provide for such safety.

Section 325.1(e): Several commenters expressed concern with language changes requiring only additional information "essential to complete an evaluation" rather than the former requirement for information to "'assist in evaluation of the application." They felt this change would reduce the data base on which decisions would be made. They indicated further that without necessary additional information, district engineers would not be able to make a reasonable decision, the public's ability to provide meaningful comments would be limited, and resource agencies would have to spend more time contacting the applicant and gathering information. They felt this could increase delays rather than limiting them. Several commenters asked that the regulations be altered to specifically require submission of information necessary for a 404(b)(1) evaluation. Similar concerns were expressed with the change stating that detailed engineering plans and specifications would not be required for a permit application. Commenters advised that without adequate plans or the ability to routinely require supplemental information it may be impossible to insure compliance with applicable water quality criteria or make reasonable permit decisions. Other commenters wanted further restrictions placed on the district engineer's ability to request additional information. Suggestions included altering the regulations to specify the type, need for, and level of detail which could be requested, and requiring the district engineer to prepare an analysis of costs and benefits of such information. Some commenters objected to requirements for providing information on project alternatives and on the source and composition of dredged or fill material.

This paragraph has been changed as proposed. The intent of this change was to assure that information necessary to make a decision would be obtained, while requests for non-essential information and delays associated with such requests would be limited.

Section 325.2(a) (6): The new requirement to document district engineer decisions contrary to state and local decisions was adopted essentially as proposed. The reference to state or local decisions in the middle of this paragraph incorrectly did not reference § 320.4(j)(4) in addition to § 320.4(j)(2). The adopted paragraph references state and local decisions in both of these paragraphs.

Section 325.2(b)(1)(ii): The May 12, 1983, proposed regulations sought to speed up the process by reducing the standard 60 day comment/waiver period to 30 days for state water quality certifications. Commenters on this paragraph offered a complete spectrum of views from strong support for the proposed changes to strong opposition to the proposal. Comments within this spectrum included opinions that: states must have 60 days; certification time should be the same as allowed by EPA (i.e. 6 months); the proposal is illegal; it conflicts with some state water quality certification regulations and procedures; and it would reduce state and public input to the decision-making process. Most states objected to this reduction with many citing established water quality certification procedures required by statute and/or regulations which require notice to the public (normally 30 days) and which allow requests for public hearings which cannot be completed within the 30-day period. We have, therefore, retained the 60 day period in the July 22, 1982, regulations. Some Corps districts have developed formal or informal agreements with the states, which identify procedures and time limits for submittal of water quality certifications and waivers. Where these are in effect, problems associated with certifications are minimized.

Many commenters objected to the May 12, 1983, proposal to delete from the July 22, 1982, regulations the statement, '"The request for certification must be made in accordance with the regulations of the certifying agency." Deleting this statement will not delete the requirement that valid requests for certification must be made in accordance with State laws. However, we have found that, on a case-by-case basis in some states, the state certifying agency and the district engineer have found it beneficial to have some flexibility to determine what constitutes a valid request. Furthermore, we believe that the state has the responsibility to determine if it has received a valid request. If this statement were retained in the Corps regulation, it would require the Corps to determine if a request has been submitted in accordance with state law. To avoid this problem, we have decided to eliminate this statement.

Section 325.2 (d) (2): Numerous commenters expressed concern with comment periods of less than 30 days. They were concerned that, in order to expedite processing times. 15 day

notices would become the norm. These commenters stated that 15 days was insufficient to prepare substantive comments and would not allow the public adequate participation in the permit process as mandated by Section 101 of the CWA. State agencies noted that, with internal and external mail requiring as much as a week each for the Corps and the state, 15 days would not provide any time for consideration of a project. Several commenters noted that such expedited review times might actually be counter-productive, as Federal and state agencies might routinely oppose projects and request permit denial so that they would then have sufficient time to review a project and to work with an applicant to resolve conflicts. We recognize that 15 days is a very short comment period considering internal agency processing and mail time. We expect that comment periods as short as 15 days would be used only for minor projects where experience has shown there would be little or no controversy. Some districts have been routinely using comment periods of less than 30 days (20 and 25 days) while others have used such procedures in only a limited number of special cases. In adopting this provision, we have modified the May 12. 1983, proposal to require the district engineer to consider the nature of the proposal, mail time, the need to obtain comments from remote areas, comments on similar proposals, and the need for site visits before designating public notice periods of less than 30 days. Additionally, after considering the length of the original comment period as well as those items noted above, the district engineer may extend the comment period an additional 30 days if warranted. We believe this provides the desired flexibility with the necessary restraints on when to use comment periods of less than 30 days.

Sections 325.2(e)(1) and 325.5(b) (2): Commenters supporting the use of letters of permission (LOP) for minor section 404 activities stated that applicants will realize significant time savings for minor requests while there will be no loss in environmental protection. Objectors believe that the Corps is seeking administrative expediency at the cost of environmental protection. Issues raised by commenters include: the legality of the 404 LOP procedure without providing for notice and opportunity for public hearing (Section 404(a) of the CWA); the legality of issuing a permit which would become effective upon the receipt or waiver of 401 certification and/or a consistency certification under the CZMA; the need to be more definitive as to the criteria for making a decision as to the categories of activities eligible for authorization under the LOP; and the lack of coordination with Federal and state resource agencies. A few commenters were concerned that the notice in the May 12, 1983, Proposed Rules was insufficient because it did not give the scope and location of the work to be covered. The commenting states also indicated that the notice was insufficient for water quality certification and coastal zone consistency determination purposes. Other commenters were concerned that, while LOP's would be coordinated with Federal and state fish and wildlife agencies, other resource agencies such as EPA should also review Section 404 LOP's. Based on the comments on the proposed 404 LOP procedures, we have decided not to adopt the 404 LOP procedures as proposed. We are not changing § 325.5(b)(2), LOP format, nor are we changing the section 10 LOP provisions. Rather, we have revised § 325.2(e)(1) to describe a separate section 404 LOP process. Unlike the section 10 LOP process, the section 404 process involves the identification of categories of discharges and a generic public notice. This LOP process is a type of abbreviated permit process which could and has been developed under the July 22, 1982, interim final regulations. These procedures will avoid unnecessary paperwork and delays for many minor section 404 projects in accordance with the intent of Section 101(f) of the Clean Water Act

Section 325.7(b): We have added a provision that, when considering a modification to a permit, the district engineer will consult with resource agencies when considering a change to terms, conditions, or features in which that agency has expressed a significant interest.

Section 325.9: One commenter generally supported this section on the district engineer's authority to determine jurisdiction but indicated that § 325.9(c) should not be adopted because it reflects the provisions of a Memorandum of Understanding (MOU) with EPA and would not be applicable if the MOU is revised or deleted. We have determined that this paragraph is not now needed and have decided not to adopt it.

Appendix A—Permit Form and Special Conditions

A. Permit Form

Project Description: A comment was received stating that intended use should be specified for all permitted work and not just for the fills involved. A comment was also received suggesting that we be more specific on what discharges are covered by permit authorizations. We agree with these points and have made appropriate changes to the instructional material relating to project descriptions.

General Conditions

General Condition 1: Several commenters stated that the specified three month lead time on the requesting of permit extensions was too long. We agree with these commenters and have, therefore, reduced this lead time from three to one month.

General Condition 2: One commenter recommended that the wording of this condition, relating to the maintenance of authorized work, be modified to indicate that restoration may be required if the permittee fails to comply with the condition. We agree and have modified the condition accordingly. Another commenter stated that it would not be reasonable to enforce this condition when a permitted underground facility is abandoned. We generally agree with this statement, However, we believe the procedures governing the enforcement of permit conditions are flexible enough to allow a reasonable approach in such situations.

General Condition 3: One commenter indicated that this condition should be modified to require the permittee to halt work that could damage discovered historic resources and to protect those resources from inadvertent damage. That commenter also indicated that under certain circumstances it would not be necessary to notify the Corps or to halt work. This notification requirement has been in effect since 1982, and the continuation of this requirement provides for the Corps to be notified in a timely manner. With this notification, the Corps can react quickly to determine the appropriate course of action. We believe this approach has proven to be satisfactory. Therefore, this condition is being adopted as proposed.

Proposed General Condition 4: In our proposal, we specifically requested comments on this condition, which would require recording the permit on the property deed. More than half the comments received were on this proposal. All but one of the commenters who addressed this condition were critical of it to a greater or lesser degree. Institutional interest observed that this condition would only add to their costs, since once lands were purchased they were seldom sold. Institutional and industrial interests observed that permits often relate to easements and

not to fee simple ownership and that compliance with the proposed condition, in such situations, would not be possible or meaningful in some locations. One commenter stated that a recordation condition should not be necessary, provided permittees complied with proposed General Condition 5, which requires owners to notify the Corps when property is transferred. To strengthen the property transfer condition, we have modified the statement preceding the transferee's signature to specify that the requirement to comply with the terms and conditions of the permit moves with the property. One commenter stated that a general condition requiring recordation where possible would be unfair, since it would not be uniformly applicable to all permittees. Further coordination with our field offices indicates that compliance with and use of the proposed condition probably occurs only in a few locations. This coordination also indicates that for some jurisdictions, where recordation is possible, the cost of recordation may be so great that it exceeds the benefits. Given that recordation may not be practical or appropriate for all Corps permits, we have deleted this general condition from the permit form and renumbered the remaining general conditions accordingly. On the other hand. the recordation requirement is appropriate and useful for many types of structures needing Corps permits, to provide fundamental fairness toward future purchasers of real property and to facilitate enforcement of permit conditions against future purchasers. For example, if the Corps were to issue a permit for a pier, that permit would require the owner to maintain the pier in good condition and in conformance with the terms and conditions of the permit. If the builder of the pier were to allow the pier to deteriorate, he could easily transfer the pier and associated property with no notice to the purchaser of the legal obligation to repair and maintain the pier, unless the permit were recorded clong with the title documents relating to the associated property. This failure to give notice to prospective purchasers would he unfair, and would increase the Federal Government's difficulty in enforcing permit conditions against future purchasers. Because of this important notice function, we have added a recordation condition under B. Special Conditions, for use wherever recordation is found to be reasonably practicable and appropriate.

General Condition 4 (Proposed General Condition 5): One commenter suggested that this condition, relating to the transference of the permit with the property, be modified to provide for notice and approval from the Corps before the permit is transferred. The reason given for this suggestion was that the Corps may have special knowledge of the particular transferee's history and capabilities and may wish to modify the terms and conditions of the permit accordingly. The suggested change would require the issuing office to conduct a review and prepare decision documentation every time property is transferred and there is a Corps permit involved. We believe that such a review in every case involving the transfer of a permit would constitute an inefficient use of available resources. Under the procedures contained in 33 CFR 325.7, a permit is subject to suspension, modification, or revocation at any time the Corps determines such action is warranted. We believe this is a better approach, and have, therefore, retained the proposed wording of this condition.

General Condition 5 (Proposed General Condition 6): One commenter recommended that this proposed condition, which relates to compliance with the provisions of the water quality certification, be changed to provide for the modification of the Corps permit if EPA promulgates a revised Section 307 standard or prohibition which applies to the permitted activity. We agree that permits must be modified when circumstances warrant. Procedures governing modifications are contained in 33 CFR 325.7, and we advise permittees of these procedures in item 5 (Reevaluation of Permit Decision) under the "Further Information" heading. Therefore, since we believe this potential requirement for permit modifications is adequately covered under the "'Further Information" heading, we have retained the proposed wording of this condition.

General Condition 8 (Proposed General Condition 7): One commenter noted that compliance inspections should be conducted during normal working hours. As a general rule, this observation seems reasonable. However, since we believe that compliance inspections will be scheduled during normal working hours when possible, we have not made any changes to the proposed wording of this condition.

Further Information

Limits of Federal Liability: One commenter suggested that the Government could, under certain circumstances, be held liable for damages caused by activities authorized by the permit and suggested that Item 3, which limits the Government's liability, be deleted in its entirety. While it is true that same courts have found the United States liable for damages sustained by the owners of permitted structures or by individuals injured in some way by those structures, it has never been the intent of the Corps to assume either type of liability or to insure that no interference or damage to a permitted structure will occur after it has been built. In permitting structures within navigable waters, the Corps does not assume any duty to guarantee the safety of that structure from damages caused by the permittee's work or by other authorized activities in the water, such as channel maintenance dredging. This is viewed as an acceptable limitation on the privilege of constructing a private structure for private benefit in a public waterway, particularly since insurance is readily available to protect the permittee from any damage his structure may sustain. Accordingly, the language in Item 3 has been further clarified to preclude any inference that the Government assumes any liability for interference with or damage to a permitted structure as a result of work undertaken by or on behalf o the United States in the public interest.

Reevaluation of Permit Decision: One commenter recommended that reevaluations be limited to the three circumstances listed. Although we believe that the vast majority of the reevaluations required will qualify under one of the three listed circumstances, we cannot exclude the possibility of non-qualifying, unique situations where the public's good may require a reevaluation of a permit decision. Therefore, we have retained the wording which states that reevaluations will not necessarily be limited to the circumstances listed. Another commenter recommended that we add to this item that we have the authority to issue administrative orders to require compliance with the terms and conditions of permits and to initiate legal actions where appropriate. The procedures governing these actions are contained in 33 CFR 326.4 and 326.5 and reference was made to these procedures in the proposed wording. However, we agree that it would be helpful to modify the proposed wording to provide permittees with a better understanding of our enforcement options; we have modified the text accordingly.

B. Special Conditions

One commenter suggested that Special Condition 5, which requires permittees authorized to perform certain types of work to provide advance notifications to the National Ocean

Service and the Corps before beginning work, be changed to allow verbal notifications followed by written confirmations, We have determined that this suggestion, if adopted, would greatly increase the chance of errors in notice documents published by the Government and would not be in the best interest of mariners. Two weeks advance notice is a reasonable period of time both for construction scheduling and for Government notification to mariners. Therefore, we have not adopted this suggestion.

One commenter suggested that a special condition be added, for use when appropriate, to require the permittee to carry out a historic preservation plan attached to the permit. The wording of special conditions are normally determined on a case-by-case basis. Only those that are used often arid are subject to standardized wording are listed in Appendix A (13. Special Conditions). While we agree that special conditions of this nature may be required, we do not believe they lend themselves sufficiently to standardized wording to warrant adding a specific special condition to Appendix A.

Three comments were received which related to General Condition (nJ on the previous permit form. This condition required the permittee to notify the issuing office of the date when the work authorized would start and of any prolonged suspensions before the work was complete. Two of the commenters recommended that this provision be retained as a general condition, and one commenter recommended that it be specified as a special condition. Our research indicates that this condition, as a general condition applicable to all permitted activities, has been virtually unenforceable in most areas and of limited use as a permit monitoring tool. We agree that special conditions requiring permittees to notify the Corps, in advance, of the dates permitted activities will start, are appropriate in certain situations. Two of these situations are covered by Special Condition 3 (maintenance dredging) and Special Condition 5 (charting of activities by National Ocean Service). Since we believe our field offices are in the best position to identify any other situations in which similar special conditions would be appropriate, we have not adopted these recommendations,

As discussed under Proposed General Condition 4 above, we have added a sixth special recordation condition for use where recordation is found to be reasonably practicable.

General: In addition to several editorial changes, we have added definitions for the word "'you" and its derivatives and the term "'this office" at the beginning of the permit form. We have substituted the term "this office" for references to the district engineer throughout the form.

Part 326—Enforcement

General: Three commenters objected to what they perceived as a lack of specific requirements and recommended that the word "'should" be changed to "shall" throughout Part 326. Another commenter stated that the proposed regulations were too specific and recommended that a significant amount of the procedures in this Part be deleted and addressed in internal guidance. The word "should," where used, allows district engineers to base their enforcement actions on an assessment of what is the best approach on a case-by-case basis. The word "shall'" would require district engineers to implement specified actions even though such actions may be obviously inappropriate in relation to a particular case. We believe this flexibility is appropriate and have, therefore, retained the word "should" in most of the places where it occurred in the proposed regulations. However, the word "will" is used at various places in this Part where flexibility is not appropriate. We believe that the proposed language achieves a proper balance between the providing of necessary guidance and flexibility.

Finally, one commenter suggested that Part 326 be rewritten to include only two requirements: orders for immediate restoration of filled wetlands and referrals for legal action if these orders are not complied with. When Congress established the Corps regulatory authorities, it allowed for the issuance of permits. To ignore the issuance of permits as one means of resoIving violations would be inappropriate.

Section 326.1: As a result of further internal coordination, we have determined that it would be appropriate to make it clear that nothing in this Part establishes a non-discretionary duty on the part of a district engineer. Further, nothing in this Part should be considered as a basis for a private right of action against a district engineer. Therefore, we have modified this paragraph accordingly.

Section 326.2: One commenter recommended that this statement of general enforcement policy be expanded to provide priority guidance on enforcement actions. Two other commenters recommended strengthening of this paragraph, with one recommending that it cite the firm and fair enforcement of the law to prohibit and deter damage, to require restoration, and to punish violators as the purpose of the Corps enforcement program. In that we refer in this paragraph to unauthorized activities, we are reflecting the fact that these activities are unauthorized and subject to enforcement actions pursuant to the legal authorities cited at the beginning of this Part. Further, the other recommended changes would simply duplicate the discussions of enforcement methods and procedures already contained in § § 326.3, 326.4. and 326.5. However, we have added a statement to this provision to reflect the fact that EPA has independent enforcement authorities under the Clean Water Act, and thus, district engineers should normally coordinate with EPA.

Section 326.3(b): One commenter recommended that this paragraph be amended to require the establishment of numbered file systems for violations. Most Corps districts already assign control numbers to enforcement actions, and since this is an administrative function, we have determined that it would be inappropriate to include this requirement in a Federal regulation designed to provide enforcement policy.

Section 326.3(c) (2): One commenter suggested rewording of this paragraph to make it clear that a violation involving a completed activity may or may not be resolved through the issuance of a Corps permit. The reference in the proposed wording to not initiating '"any additional work before obtaining required Department of the Army authorizations" apparently led to the commenter misunderstanding this paragraph. The intent of this wording related to warning a violator not to initiate work on other projects before obtaining required Corps permits. Since the violator is in the process of being made aware of the legal requirements for obtaining Corps permits, we have determined that this warning is unnecessary and have, therefore, deleted it.

Section 326.3 (c) (3): One commenter recommended that this paragraph be amended to indicate that the information requested will also be used for determining whether legal action is appropriate in addition to determining what initial corrective measures may be required. We agree that the information obtained from violators may provide a basis for enforcement decisions other than those relating to interim corrective measures. Therefore, we have revised this provision to provide for notifying violators of potential enforcement consequences and for the more generalized use of the information provided by violators in the

identification of appropriate enforcement measures.

Section 326.3(c) (4): One commenter recommended that this provision be reworded to indicate that the limitations on unauthorized work of an emergency nature are to be established in conjunction with Federal and state resource agencies. We believe it is understandable that actions of this type will be completed on an expedited basis with the procedures in § 326.3(c—d) being followed concurrently. Since § 326.3(d) already provides for interagency consultations, in appropriate cases, we do not believe it is necessary to duplicate that guidance in this provision.

Section 326.3 (d) (1): One commenter recommended that "initial corrective measures" be defined as measures "which substantially eliminate all current and future detrimental impacts resulting from the unauthorized work." This commenter also recommended that the procedures in 33 CFR 320.4 and 40 CFR Part 230 be referenced for use in determining what '"initial corrective measures" are required. Essentially, this commenter is recommending that all violators be denied a Corps authorization and required to undertake full corrective measures in the initial stage of an enforcement action. This would not be a reasonable or practical approach, since it would eliminate public participation and would result in the removal of work that may have been permitted under normal circumstances. Another commenter objected to the statement that further enforcement actions '"should normally" be unnecessary if the initial corrective measures substantially eliminate all current and future detrimental impacts. This commenter sees this provision as barring legal action in appropriate cases such as those involving willful, flagrant, or repeated violations. This is not the case. To say that such corrective measures "should normally" resolve a violation does not mean that they will "always" resolve a violation. Another commenter stated that consultations with the Fish and Wildlife Service and the National Marine Fisheries Service should be made mandatory in this paragraph pursuant to the Fish and Wildlife Coordination Act. The reason given was that this provision would result in the issuance of permits which would require such consultations. This paragraph deals with initial corrective measures and not with the issuance of permits. These agencies will be given an opportunity to comment in response to a public notice before any decision is made on an after-the-fact permit application. In view of the above discussion, we have retained the proposed wording of this paragraph.

Section 326.3(d) (2): One commenter recommended that this paragraph be deleted on the basis that it provided the district engineer with too much discretion and questioned the cross-reference to § 326.3(3). This paragraph was intended to provide guidance to district engineers in situations involving prior initiations of litigation or denials of essential authorizations or certifications by other Federal, state or local agencies. We believe district engineers should have the discretionary authority to determine what is a reasonable and practical course of action for the Corps under these circumstances. However, we have revised this paragraph to clarify its intent and to correct the cross-reference.

Section 328.3(d)(3): As a result of further review within the Corps, we have determined that the provision proposed as § 326.3(e)(1)(i), which states that it is not necessary to issue a Corps permit for initial corrective measures, should be moved to § 326.3(d) to more appropriately reflect the sequence of enforcement procedures. Therefore, we have modified this provision and established it as new § 326.3(d)(3).

Section 326.3(e): One commenter objected to the after-the-fact permit process, and observed that the process was generally seen as a mechanism to avoid compliance with the law. Exceptions to the processing of after-the-fact permit applications are contained in § 326.3(e)(i—iv). However, in most cases, the public participation associated with the processing of an application is necessary before a violation can be appropriately resolved.

Section 326.3(e) (1): One commenter recommended that this paragraph be amended to specify the criteria for legal action and to require that public notices associated with after-the-fact permit applications clearly identify that a violation is involved. The criteria for legal actions are given in § 326.5(a), and permit decisions are based on whether an activity complies with the section 404(b)(1) Guidelines, where applicable, and on whether it is or is not found to be contrary to the public interest. Permit decisions are not based on whether a permit application is before or after-the-fact. We have, therefore, retained the proposed wording of this paragraph.

Proposed Section 326.3(e)(1)(i): We have deleted this provision here and have moved a modified version of it to new § 326.3(d)(3); see discussion under § 326.3(d)(3).

Section 326.3(e)(1)(i)—Proposed as 326.3 (e)(1)(ii): This provision indicates that the processing of an after-the-fact permit application will not be necessary "when" detrimental impacts have been eliminated by restoration. One commenter recommended that district engineers be required to consult with EPA before determining that restoration has been completed that eliminates current and future detrimental impacts. We have addressee this comment by modifying § 326.2 and § 326.3(g) to provide for such coordination when the district engineer is aware of an enforcement action being considered by EPA under its independent enforcement authorities. Another commenter observed that the word "when" appeared to be in error and recommended substituting the word "unless." This would indicate that the Corps should process an after-the-fact permit application only after restoration had taken place and there is no work requiring a permit. This obviously would not be reasonable. In view of the above discussion, we have retained the proposed wording of this provision.

Section 326.3(e)(1)(iii)—Proposed as 326.3(e)(1)(iv): One commenter recommended that a provision be added to this paragraph to prohibit the acceptance of an application for a Corps permit where an activity is not in compliance with other Federal, state, or local authorizations or certifications. In essence, this amounts to requiring district engineers to take steps to enforce the terms and conditions of another agency's authorization or certification. We believe this is the issuing agency's responsibility and not the responsibility of the Corps. Of course, where that other agency has denied a requisite authorization, the Corps would not accept an application for processing.

Section 326.3(e)(1)(iv)—Proposed as 326.3(e)(1)(v): Two commenters recommended rewording of this paragraph to prohibit the acceptance or processing of any after-the-fact permit application when the Corps is aware of litigation or other enforcement actions that have been initiated by other Federal, state or local agencies, We believe the Corps should, in appropriate situations, be able to take positions on cases that are in conflict with the viewpoints of other agencies. Therefore, we have retained the wording of this paragraph essentially as proposed. However, since EPA has independent enforcement authorities, we have provided for coordination with EPA in §§ 326.2 and 326.3(g).

Section 326.3(g): One commenter indicated that this paragraph should delineate EPA's responsibility over

recognizing and reporting unpermitted discharges. This paragraph deals only with cases where EPA is considering an enforcement action. The reporting of violations is covered under § 326.3(a). Another commenter recommended that this paragraph be reworded to ensure that Corps actions under Part 326 are not in conflict with EPA enforcement actions. Another commenter, a state agency, suggested that this provision be expanded to require similar consultations with state agencies that have initiated enforcement actions. The reason we have provided for consultations with EPA in this paragraph is due to the fact that both the Corps and EPA have overlapping authorities pursuant to the Clean Water Act. This is not the case with state agencies. Nevertheless, we believe district engineers will wish to consult with state agencies in appropriate circumstances. In any event, as we stated in our discussion relating to the wording of § 326.3(e)(iv), we believe the Corps should have the right to take a position that may conflict with another agency's viewpoint. However, we have revised this provision to emphasize that district engineers should coordinate with EPA when they are aware of enforcement actions being considered by EPA under its independent enforcement authorities.

Section 326.4(a-b): As a result of further internal coordination, we have determined that § 326.4(a) should make it clear that district engineers have the discretionary authority to determine when the inspection of permitted activities is appropriate. We have modified § 326.4(a) accordingly. In addition, we have added a new § 326.4(b) to further discuss inspection limitations,

Section 326.4(d)—Proposed as *326.4(c):* One commenter, a state agency, objected to the provisions in this paragraph for attempting to obtain voluntary compliance before issuing a formal compliance order. The rationale given was that the absence of a formal order would make coordination between the Corps and the state difficult. Another state agency recommended consultations with state agencies and with EPA. The proposed, noncompliance procedures do not prohibit early coordination with other regulatory agencies, when appropriate, and presumably, if the permittee quickly brings nis work into compliance, such coordination should not be necessary.

One commenter objected to allowing a district engineer to issue a compliance order and to not making the use of Corps suspension/revocation procedures or legal actions mandatory. Another commenter recommended that suspension/ revocation procedures or legal actions be made mandatory if a violator fails to comply with a compliance order. The issuance of a compliance order is provided for in section 404(s) of the Clean Water Act, and in most cases, we believe that the methods available for obtaining voluntary compliance should be used before discretionary consideration is given to using the Corps suspension/ revocation procedures or initiating legal action.

Another commenter objected to the term ''"significantly serious to require an enforcement action" on the basis that all violations are worthy of some enforcement action. Minor deviations from the terms and conditions of a Corps permit may not always warrant an enforcement action. For example, would a dock authorized to be constructed with a length of 50 feet but inadvertently constructed with a length of 51 feet constitute a violation warranting an enforcement action? We agree there may be extenuating circumstances, such as the additional length of the dock being just enough to impact the water access of a neighbor. However, this is a judgment that is best made by the district engineer involved.

One Commenter objected to the term "mutually agreeable solution" on the basis that such a solution could invalidate the prior results of coordination with resource agencies. Since this term refers to bringing the permitted activity into compliance or the resolution of the violation with a permit modification using the modification procedures in 33 CFR 325.7(b), such resolutions would not invalidate prior coordination. In view of the above discussion, we have retained the proposed wording of this paragraph.

Section 326.5 (a): One commenter requested that the words ''"willful" and "repeated" be deleted from this paragraph, the rationale being, apparently, that most violators are not repeat or willful offenders and that the Corps should take the one opportunity it has to bring legal action against these one-time violators. We do not agree with this approach as being either reasonable or practical. Another commenter recommended adding violations that result in substantial impacts to the list of violations that should be considered appropriate for legal action. We agree with this recommendation and have modified the wording of this provision accordingly.

Section 320.5(c): One commenter recommended rewording of this paragraph to require that copies be provided to EPA of Corps referrals to local U.S. Attorneys. We believe it would be more appropriate to address matters relating to the detailed aspects of interagency coordination in interagency agreements. Therefore, we have retained the proposed wording of this paragraph.

Section 326.5(d) (2): As a result of further internal coordination, we have determined that litigation cases involving isolated water no longer need to be referred to the Washington level on a routine basis. Therefore, we have deleted this provision.

Section 326.5(e): One commenter recommended that the word "may" be replaced with the words ''"encouraged to" in the provision relating to sending litigation reports to the Office of the Chief of Engineers when the district engineer determines that an enforcement case warrants special attention and the local U.S. Attorney has declined to take legal action. We agree with this recommendation and have made the change.

Another commenter suggested that wording be aided to this paragraph to address circumstances in which permits are not required. The fact that a legal option may not be available does not mean that a permit is not required. If the district engineer chooses to close the case record, the activity in question will still be unauthorized and therefore illegal. Such unauthorized activities will be taken into account if the responsible parties become involved in future violations. One commenter suggested that Corps attorneys initiate legal actions as an alternative to actions by local U.S. Attorneys. However, the Corps does not have the authority under existing Federal laws to initiate legal actions on its own.

Another commenter recommended that this paragraph be modified to provide for joint Federal/state prosecution of violators. Since this involves discretionary decisions on the part of the Department of Justice, it would not be appropriate to include a provision of this nature in the Corps enforcement regulations,

Part 328—Definition of Waters of the United States

This part is being added in order to clarify the scope of the Section 404 permit program. This part was added in direct response to many concerns expressed by both the public and the Presidential Task Force on Regulatory Relief. We have not made changes to existing definitions; however, we have provided clarification by simply setting

them apart in a separate and distinct Part 328 of the regulation.

The format for Part 328 has been changed slightly from the proposed regulation in order to improve clarity and reduce duplication. The content of the proposed § 328.2 "General Definitions" has been partially combined with § 328.3 "Definitions." The remainder has been reestablished as § 328.5, "Changes in Limits of Waters of the United States." Section 328.2 has been established as "General Scope." The proposed § § 328.4 and 328.5 have been combined into § 328.4 and renamed "Limits of Jurisdiction."

A number of commenters appeared to have misinterpreted the intent of this part. Many thought we were trying to reduce the scope of jurisdiction while others believed we were trying to expand the scope of jurisdiction. Neither is the case. The purpose was to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted.

Section 328.3: Definitions. This section incorporates the definitions previously found in § 323.3 (a), (c), (d), (f) and (g). Paragraphs (c), (d), (f) and (g) were incorporated without change. EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.

For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "'waters of the United States."

(a) Non-tidal drainage and irrigation ditches excavated on dry land.

(b) Artificially irrigated areas which would revert to upland if the irrigation ceased.

(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing,

(d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.

(e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).

The term "navigable waters of the United States" has not been added to this section since it is defined in Part 329.

A number of comments were received concerning the proposed change to the definition of the terms "'adjacent" and the proposed definitions for the terms "inundation", '"saturated", "prevalence", and "typically adapted." A number of commenters believed that these terms may better define the scope of jurisdiction of the section 404 program, but such definitions should more rightfully be within the province of the Environmental Protection Agency in order to remain consistent with the opinion of Benjamin Civiletti, Attorney General (September 5, 1979). These definitions would require the prior approval of the Environmental Protection Agency, which has not been forthcoming. Therefore, these new proposed definitions will not be adopted at this time.

To respond to requests for clarification, we have added a definition for "tidal waters." The definition is consistent with the way the Corps has traditionally interpreted the term.

Section 328.4: Limits of Jurisdiction. Section 328.4(c)(1) defines the lateral limit of jurisdiction in non-tidal waters as the ordinary high water mark provided the jurisdiction is not extended by the presence of wetlands. Therefore, it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible.

Section 328.5: Changes in Limits of Waters of the United States. This section was changed to reflect both natural and man-made changes to the limits of waters of the United States. This change was made for clarification and resulted from consultation with the Environmental Protection Agency.

Section 328.6: Supplemental Glorification. Most commenters favored the Corps plans to give special consideration to unique areas such as Arctic Tundra that do not easily fit the generic" wetlands definition. Several commenters indicated that the Corps should clarify its intended use of this section, and one questioned the need to "describe" unique areas in the Federal Register. A number of commenters indicated that criteria should be specified for determining wetland types to be included as unique areas. Some commenters stated that close coordination between the Corps and the Environmental Protection Agency will be necessary when selecting unique areas and developing procedures for making wetland determinations in such areas, since the Environmental Protection Agency has the final authority to determine the scope of '"Waters of the United States."

While we believe that supplemental clarification of unique areas will be a positive step in clarifying the scope of jurisdiction under the section 404 permit program, we have determined that such supplemental clarification can be done under existing regulations of the Environmental Protection Agency and the Corps and therefore have deleted this section.

Part 329—Definition of Navigable Waters of the United States

We are currently planning to propose a complete revision of Part 329 in the near future, to simplify and clarify the procedures involved, while retaining the essential aspects of the relevant policy. In the interim, we are making the two minor changes discussed below.

Section 329.11: This section has been modified to clarify that the lateral extent of jurisdiction in rivers and lakes extends to the edge of all such waterbodies as it does in bays and estuaries (§ 329.12(b)).

Section 329.12(a): This section has been corrected to reflect that the territorial seas, for the purpose of Rivers and Harbors Act of 1899 jurisdiction, extend 3 geographic miles everywhere and are measured from the baseline.

Part 330—Nationwide Permits We are reissuing the 26 nationwide permits at § 330.5(a) as modified and conditioned. The nationwide permits will be in effect for 5 years beginning with the effective date of this regulation, unless sooner revised or revoked.

Section 330.1: This section was restructured and updated in order to improve its readability and technical accuracy. The definition concerning the division engineer's discretionary authority was deleted from this section since similar language appears in § 330.2. "Definitions." The discussion concerning the applicability of nationwide permits as they relate to

other Federal, state, and local authorizations was deleted from this section and relocated to § 330.5(d) "Further Information."

Section 330.2: The definition of the term "'headwaters" was deleted from Part 323 and relocated to § 330.2(b), since the definition is used as part of the nationwide permit program. The definition of the term "'natural lake" which was proposed at § 330.2(c) has been deleted. Changes to the "headwaters"/'"isolated waters" nationwide permit which is found at § 330.5(a)(26) have obviated the need for this definition.

Section 330.5: In order to better inform the public of the statutory authority under which each nationwide permit has been issued, we have added the authority by parenthetical expression at the end of each nationwide permit.

We had proposed nationwide permits for activities funded or authorized by another Federal agency or department and for activities adjacent to Corps of Engineers civil works projects. Most commenters discussed the two proposed nationwide permits together. The most frequent comments questioned whether they would comply with section 404(e) of the CWA. They believed these nationwide permits could authorize a wide variety of Federal projects that would not be similar in nature and projects which could have significant adverse environmental impacts on aquatic resources. Numerous commenters stated that the Corps would be delegating its 404(b)(1) compliance responsibilities to other agencies and that there is a natural tendency of such agencies to be self-serving. Many commenters, including some states, objected that the public and other agencies would not have an opportunity to review some large individual projects. Many commenters encouraged the adoption of these nationwide permits: in most cases they based their opinion upon reduction in duplication and the expediting of project authorization. Based on the comments received we have decided that clarification of activities that could be covered by nationwide permits would be necessary to insure proper understanding and field application. Because of the complexity of doing this and an evaluation of the comments received, we have decided not to adopt these two nationwide permits.

Section 330.5(a)(3): This nationwide permit for repair, rehabilitation, or replacement of existing structures or fill has been clarified to show that beach restoration is not authorized by this nationwide permit.

Section 330.5(a)(6): This nationwide permit for survey activities was clarified to show that it does not authorize the drilling of exploration-type bore holes for oil and gas exploration.

Section 330.5(o) (7): This nationwide permit for outfall structures was clarified by adding language concerning minor excavation, filling and other work which is routinely associated with the installation of intake and outfall structures.

Section 330.5(a)(18): This nationwide permit for discharges up to 10 cubic yards was clarified by indicating that it does not authorize discharges for the purpose of stream diversion. The footnote was deleted because it was redundant with the terms of the nationwide permit itself.

Section 330.5(a) (1 9): This nationwide permit for dredging up to 10 cubic yards was clarified by indicating that it does not authorize the connection of canals or other artificial waterways to navigable waters of the United States.

Section 330.5(a) (22): This nationwide permit for the removal of obstructions to navigation was clarified by indicating that it does not authorize maintenance dredging, shoal removal, or riverbank snagging.

Section 330.5(b) (3): This condition for the protection of endangered species was modified to set forth more clearly options available to the district engineer to satisfy section 7 of the Endangered Species Act when it has been determined that an activity may adversely affect any listed endangered species or its critical habitat.

Section 330.5(b) (7): This condition for the protection of wild and scenic rivers was modified to define more clearly components of the National Wild and Scenic River System by showing that it includes any Congressionally designated "study river."

Section 330.5(b) (9): This condition for the protection of historic properties was added in response to numerous comments which expressed concern for an apparent lack of consideration which was being given historic properties. This condition outlines the procedures to be followed by both the permittee and the district engineer to provide for modification, suspension, or revocation of a nationwide permit or contact with the Advisory Council on Historic Preservation if an activity authorized by a nationwide permit may adversely affect an historic property.

Section 330.5(b)(1C): This condition was added as a result of comments which expressed concern that activities performed under the nationwide permits could impair reserved tribal rights.

Section 330.5(b) (11) and (12): These conditions were adopted as proposed. They provide notification to the public that, within certain states, authorization for the activity may have been denied without prejudice as a result of state 401 water quality certification denial or nonconcurrence with Coastal Zone Management consistency. These conditions trigger the provisions of §§ 330.9 and 330.10.

Section 330.5(b)(13): This condition was added to alert the public that regional conditions may have been added by the division engineer in accordance with § 330.8(a).

Section 330.5(c): The Grandfathering provision included in the October 5, 1984, final regulations expires on April 5, 1986, before the effective date of these regulations and is, therefore, no longer needed and has been deleted. A new paragraph has been added to provide the public further information on nationwide permits as they relate to such things as compliance with conditions, other required authorizations, property rights, Federal projects, and revised or modified water quality standards.

Section 330.5(d): This paragraph has been added to clarify that the Chief of Engineers has the authority to modify, suspend, or revoke any nationwide permit.

Some states indicated in their comments that there might be other ways to reduce burdens on the public within their state other than the nationwide permits. One state suggested that it might be appropriate to revoke all the nationwide permits in favor of regional permits subject to interagency review. The authority exists for the Chief of Engineers to revoke some or all of the nationwide permits within a state. There are also existing provisions in the regulations for district engineers and the states to develop a permit system designed around specific state authorities. These existing provisions include regional general permits, programmatic general permits, transfer of the 404 program (see 33 CFR 323.5), joint processing, permit consolidation, preapplication consultation and special area management planning. Before adopting a permit system designed around specific state authorities, a public notice providing an opportunity for a public hearing would be issued outlining the proposed permit system within the state and the proposal to revoke the nationwide permits. If such a system is developed, the Chief of Engineers will consider revoking all or most of the nationwide permits within a state.

Section 330.8(a): The concept of case-by-case regional conditioning authority received overwhelming support. This new paragraph allows the division engineer through discretionary authority to add activity specific conditions to nationwide permits on a case-by-case basis. The district engineer may do the same when there is mutual agreement with the permittee or when conditions are necessary based on conditions of a state 401 certification.

Section 330.8(c): This paragraph was modified to clarify that, although the division engineer has used discretionary authority to require individual permits, he may subsequently allow the activity to be authorized by nationwide permit if the impediment to using the nationwide permit, which triggered the discretionary authority, has been removed.

Section 330.8(c) (2): This paragraph has been modified to allow division engineers the discretionary authority to require individual permits for categories of activities or specific geographic areas. This authority was previously exercised by the Chief of Engineers. However, the Chief of Engineers is retaining this authority on a statewide or nationwide basis.

Section 330.9: Many commenters objected to the issuance of nationwide permits when a state denies 401 certification. Their objections were based on the Clean Water Act requirement that "No license or permit shall be granted until the certification . . . has been obtained or has been waived." Commenters expressed strong concerns about the validity of such permits, and stated that issuance would constitute a de facto transfer of the administration of this portion of the 404 permit program to the objecting states. An attendant concern was that, if states were unable to respond within the time specified by the Corps, a waiver would be presumed, and the nationwide permit would become effective, whether or not this would have been the intent of the state. Some commenters suggested that states would be forced to deny certifications because of inadequate time to ensure that proposed activities would not violate water quality standards. Most commenters opposed district engineers having discretionary authority over conditions to the 401 certification. One commenter believes this authority conflicts with states' rights. Another suggested that the proposed action could prod states into adopting thef" own wetland laws and regulatory programs. Several commenters supported the proposal, stating that it was a means of preserving the utility of the general permit program.

Section 330.9 has been modified to provide that, if a state denies a required 401 certification for a particular nationwide permit, then authorization for all discharges covered by the nationwide permit within the state is denied without prejudice until the state issues an individual or generic water quality certification or waives its right to do so. We did not adopt the 30 day waiver period but rather will rely on the language at §325.2(b)(1) which defines a reasonable period of time. This section was also modified to notify the public that the district engineer will include conditions of the 401 water quality certification as special conditions of the nationwide permit.

Section 330.9(b): This subsection has been added to notify the public of the certification requirements of the various nationwide permits.

Section 330.10: A number of coastal states commented that consistency determination or waiver thereof must have been obtained prior to the promulgation of the nationwide permits. Some commenters asserted that such a requirement is not a statutory prerequisite to permit issuance. Others contend that assuming a waiver of certification preempts the individual state's authority and thwarts Congressional intent that the permit process involves oversight by the state as well as Federal agencies.

Section 330.10 has been modified to state that, in certain instances where a state has not concurred that a particular nationwide permit is consistent with its coastal zone management plan, authorization for all activities subject to such nationwide permit within or affecting the state coastal zone agency's area of authority is denied without prejudice until the applicant has furnished to the district engineer a coastal zone management consistency determination pursuant to section 307 of the Coastal Zone Management Act and the state has either concurred in that determination or waived its right to do so.

Section 330.11: This subsection was added to clarify existing procedures to establish a time limit in which a permittee may rely on confirmation from the district engineer that an activity is covered by a nationwide permit, and to specify procedures to modify, suspend, or revoke the permittee's right to proceed under the nationwide permit after the district engineer notified the permittee that the activity may proceed.

Section 330.12: This subsection was modified to provide a twelve month transition period for projects which may be affected by future changes in nationwide permits. After considering equity established in reliance on the nationwide permit and that the public will in all likelihood receive ample notice of proposed changes, we believe that this transition period is both reasonable and equitable. In addition, if necessary on a case-by-case basis we can, even though there is a grandfather provision, exercise discretionary authority pursuant to § 330.8 or modify, suspend or revoke individual authorization pursuant to 33 CFR 325.7.

State Certification of Nation wide Permits

Most states have issued or waived 401 certification and/or Coastal Zone Management consistency concurrence for one or more of the twenty six nationwide permits. Many states have issued a conditional certification and some have denied certification! consistency concurrence. Final action is still pending in some of the states but is imminent. The primary mechanism for keeping the public informed of the status and/or changes in state certifications or Coastal Zone Management consistency concurrence will be public notices issued by the district engineers within the affected states. The district engineers will be issuing public notices concurrent with the publication of these regulations. Subsequent notices will be issued as changes occur.

Listed below are those states which, as of the date of this printing, have either denied or conditionally issued 401 certification and/or coastal zone management consistency concurrence for one or more of the nationwide permits. For more current and detailed information you should consult with the appropriate district engineer.

Alaska, California, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Washington, West Virginia and Wisconsin. Determinations under Executive Order 12291 and the Regulatory Flexibility Act. The Department of the Army has determined that the revisions to these regulations do not contain a major proposal requiring the preparation of a regulatory analysis under E.O. 12291. The Department of the Army certifies, pursuant to section 605(b) of the Regulatory Flexibility Act of 1980, that these regulations will not have a significant economic impact on a substantial number of entities.

Note 1.—The term "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

List of Subjects

33 CFR Part 320
Environmental protection, Intergovernmental relations, Navigation, Water pollution control, Waterways.

33 CFR Part 321
Dams, Intergovernmental relations, Navigation, Waterways.

33 CFR Part 322
Continental shelf, Electric power, Navigation, Water pollution control, Waterways.

33 CFR Part 323
Navigation, Water pollution control, Waterways.

33 CFR Part 324
Water pollution control.

33 CFR Part 325
Administrative practice and procedure, Intergovernmental relations, Environmental protection, Navigation, Water pollution control, Waterways.

33 CFR Part 326
Investigations, Intergovernmental relations, Law enforcement, Navigation, Water pollution control, Waterways.

33 CFR Part 327
Administrative practice and procedure, Navigation, Water pollution control, Waterways.

33 CFR Part 328
Navigation, Water pollution control, Waterways.

33 CFR Part 329
Waterways.

33 CFR Part 330
Navigation, Water pollution control, Waterways.

Dated: November 4, 1986, Robert K. Dawson, *Assistant Secretary of the Army (Ci vil Works).*

Accordingly, the Department of the Army is revising 33 CFR Parts 320, 321, 322, 323, 324, 325, 326, 327, 329, and 330 and adding Part 328 to read as follows:

PART 320—GENERAL REGULATORY POLICIES

Sec.

Authority: 33 U.S.C. 401 *et seq.;* 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 320.1 Purpose and scope.

(a) *Regulatory approach of the Corps of Engineers.* (1) The U.S. Army Corps of Engineers has been involved in regulating certain activities in the nation's waters since 1890. Until 1968, the primary thrust of the Corps' regulatory program was the protection of navigation. As a result of several new laws and judicial decisions, the program has evolved to one involving the consideration of the full public interest by balancing the favorable impacts against the detrimental impacts. This is known as the "public interest review." The program is one which reflects the national concerns for both the protection and utilization of important resources.

(2) The Corps is a highly decentralized organization. Most of the authority for administering the regulatory program has been delegated to the thirty-six district engineers and eleven division engineers. If a district or division engineer makes a final decision on a permit application in accordance with the procedures and authorities contained in these regulations (33 CFR Parts 320—330), there is no administrative appeal of that decision.

(3) The Corps seeks to avoid unnecessary regulatory controls. The general permit program described in 33 CF'R Parts 325 and 330 is the primary method of eliminating unnecessary federal control over activities which do not justify individual control or which are adequately regulated by another agency.

(4) The Corps is neither a proponent nor opponent of any permit proposal. However, the Corps believes that applicants are due a timely decision. Reducing unnecessary paperwork and delays is a continuing Corps goal.

(5) The Corps believes that state and federal regulatory programs should complement rather than duplicate one another. The Corps uses general permits, joint processing procedures, interagency review, coordination, and authority transfers (where authorized by law) to reduce duplication.

(6) The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities. A determination pursuant to this authorization shall constitute a Corps final agency action. Nothing contained in this section is intended to affect any authority EPA has under the Clean Water Act.

(b) *Types of activities regulated.* This Part and the Parts that follow (33 CFR Parts 321—330) prescribe the statutory authorities, and general and special policies and procedures applicable to the review of applications for Department of the Army (DA) permits for controlling certain activities in waters of the United States or the oceans. This part identifies the various federal statutes which require that DA permits be issued before these activities can be lawfully undertaken; and related Federal laws and the general policies applicable to the review of those activities. Parts 321—324 and 330 address special policies and procedures applicable to the following specific classes of activities:

(1) Dams or dikes in navigable waters of the United States (Part 321);

(2) Other structures or work including excavation, dredging, and/or disposal activities, in navigable waters of the United States (Part 322);

(3) Activities that alter or modify the course, condition, location, or capacity of a navigable water of the United States (Part 322);

(4) Construction of artificial islands, installations, and other devices on the outer continental shelf (Part 322);

(5) Discharges of dredged or fill material into waters of the United States (Part 323);

(6) Activities involving the transportation of dredged material for the purpose of disposal in ocean waters (Part 324); and

(7) Nationwide general permits for certain categories of activities (Part 330).

(c) *Forms of authorization.* DA permits for the above described activities are issued under various forms of authorization. These include individual permits that are issued following a review of individual applications and general permits that authorize a category or categories of activities in specific geographical regions or nationwide. The term "general permit" as used in these regulations (33 CFR Parts 320—330) refers to both those regional permits issued by district or division engineers on a regional basis and to nationwide permits which are issued by the Chief of Engineers through publication in the Federal Register and are applicable throughout the nation. The nationwide permits are found in 33 CFR Part 330. If an activity is covered by a general permit, an application for a DA permit.
does not have to be made. In such cases, a person must only comply with the conditions contained in the general permit to satisfy requirements of law for a DA permit. In certain cases pre-notification

may be required before initiating construction. (See 33 CFR 330.7)

(d) *General instructions.* General policies for evaluating permit applications are found in this part. Special policies that relate to particular activities are found in Parts 321 through 324. The procedures for processing individual permits and general permits are contained in 33 CFR Part 325. The terms "navigable waters of the United States" and "waters of the United States" are used frequently throughout these regulations, and it is important from the outset that the reader understand the difference between the two. "Navigable waters of the United States" are defined in 33 CFR Part 329. These are waters that are navigable in the traditional sense where permits are required for certain work or structures pursuant to Sections 9 and 10 of the Rivers and Harbors Act of 1899, "Waters of the United States" are defined in 33 CFR Part 328. These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to Section 404 of the Clean Water Act.

§ 320.2 Authorities to issue permits.

(a) Section 9 of the Rivers and Harbors Act, approved March 3, 1899 (33 U.S.C. 401) (hereinafter referred to as section 9), prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single state, the structure may be built under authority of the legislature of that state if the location and plans or any modification thereof are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit (See 33 CFR Part 321.) Section 9 also pertains to bridges . and causeways but the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act of October 15, 1966 (49 U.S.C. 1155g(6)(A)). A DA permit pursuant to section 404 of the Clean Water Act is required for the discharge of dredged or fill material into waters of the United States associated with bridges and causeways. (See 33 CFR Part 323.)

(b) Section 10 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 403) (hereinafter referred to as section 10), prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavating from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit. The authority of the Secretary of the Army to prevent obstructions to navigation in navigable waters of the United States was extended to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf, by section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)). (See 33 CFR Part 322.)

(c) Section 11 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 404), authorizes the Secretary of the Army to establish harbor lines channelward of which no piers, wharves, bulkheads, or other works may be extended or deposits made without approval of the Secretary of the Army. Effective May 27, 1970, permits for work shoreward of those lines must be obtained in accordance with section 10 and, if applicable, section 404 of the Clean Water Act (see **§** 320.4(o) of this Part).

(d) Section 13 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 407), provides that the Secretary of the Army, whenever the Chief of Engineers determines that anchorage and navigation will not be injured thereby, may permit the discharge of refuse into navigable waters. In the absence of a permit, such discharge of refuse is prohibited. While the prohibition of this section, known as the Refuse Act, is still in effect, the permit authority of the Secretary of the Army has been superseded by the permit authority provided the Administrator, Environmental Protection Agency (EPA), and the states under sections 402 and 405 of the Clean Water Act, (33 U.S.C. 1342 and 1345). (See 40 CFR Parts 124 and 125.)

(e) Section 14 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 408), provides that the Secretary of the Army, on the recommendation of the Chief of Engineers, may grant permission for the temporary occupation or use of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States. This permission will be granted by an appropriate real estate instrument in accordance with existing real estate regulations.

(f) Section 404 of the Clean Water Act (33 U.S.C. 1344) (hereinafter referred to as section 404) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into the waters of the United States at specified disposal sites. (See 33 CFR Part 323.) The selection and use of disposal sites will be in accordance with guidelines developed by the Administrator of EPA in conjunction with the Secretary of the Army and published in 40 CFR Part 230. If these guidelines prohibit the selection or use of a disposal site, the Chief of Engineers shall consider the economic impact on navigation and anchorage of such a prohibition in reaching his decision. Furthermore, the Administrator can deny, prohibit, restrict or withdraw the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearing and after consultation with the Secretary of the Army, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. (See 40 CFR Part 230).

(g) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413) (hereinafter referred to as section 103), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the transportation of dredged material for the purpose of disposal in the ocean where it is determined that the disposal will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. The selection of disposal sites will be in accordance with criteria developed by the Administrator of the EPA in consultation with the Secretary of the Army and published in 40 CFR Parts 220—229. However, similar to the EPA Administrator's limiting authority cited in paragraph (f) of this section, the Administrator can prevent the issuance of a permit under this authority if he

finds that the disposal of the material will result in an unacceptable adverse Impact on municipal water supplies, shellfish beds, wildlife, fisheries, or recreational areas. (See 33 CFR Part 324).

§ 320.3 Related laws.

(a) Section 401 of the Clean Water Act (33 U.S.C. 1341) requires any applicant for a federal license or permit to conduct any activity that may result in a discharge of a pollutant into waters of the United States to obtain a certification from the State in which the discharge originates or would originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the affected waters at the point where the discharge originates or would originate, that the discharge will comply with the applicable effluent limitations and water quality standards. A certification obtained for the construction of any facility must also pertain to the subsequent operation of the facility.

(b) Section 307(c) of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1456(c)), requires federal agencies conducting activities, including development projects, directly affecting a state's coastal zone, to comply to the maximum extent practicable with an approved state coastal zone management program. Indian tribes doing work on federal lands will be treated as a federal agency for the purpose of the Coastal Zone Management Act. The Act also requires any non-federal applicant for a federal license or permit to conduct an activity affecting land or water uses in the state's coastal zone to furnish a certification that the proposed activity will comply with the state's coastal zone management program. Generally, no permit will be issued until the state has concurred with the non-federal applicant's certification. This provision becomes effective upon approval by the Secretary of Commerce of the state's coastal zone management program. (See 15 CFR Part 930.)

(c) Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (16 U.S.C. 1432), authorizes the Secretary of Commerce, after consultation with other interested federal agencies and with the approval of the President, to designate as marine sanctuaries those areas of the ocean waters, of the Great Lakes and their connecting waters, or of other coastal waters which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or aesthetic values. After designating such an area, the Secretary of Commerce shall issue regulations to control any activities within the area. Activities in the sanctuary authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with the purposes of Title III of the Act and can be carried out within the regulations for the sanctuary.

(d) The National Environmental Policy Act of 1969 (42 U.S.C. 4321—4347) declares the national policy to encourage a productive and enjoyable harmony between man and his environment. Section 102 of that Act directs that 'to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall * * * insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations * * *". (See Appendix B of 33 CFR Part 325.)

(e) The Fish and Wildlife Act of 1956 (18 U.S.C. 742a, *et seq.),* the Migratory Marine Game-Fish Act (16 U.S.C. 760c—760g), the Fish and Wildlife Coordination Act (16 U.S.C. 661—666c) and other acts express the will of Congress to protect the quality of the aquatic environment as it affects the conservation, improvement and enjoyment of fish and wildlife resources, Reorganization Plan No. 4 of 1970 transferred certain functions, including certain fish and wildlife-water resources coordination responsibilities, from the Secretary of the Interior to the Secretary of Commerce. Under the Fish and Wildlife Coordination Act and Reorganization Plan No. 4. any federal agency that proposes to control or modify any body of water must first consult with the United States Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, and with the head of the appropriate state agency exercising administration over the wildlife resources of the affected state.

(f) The Federal Power Act of 1920 (16 U.S.C. 791a *et seq.),* as amended, authorizes the Federal Energy Regulatory Agency (FERC) to issue licenses for the construction and the operation and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, and other physical structures of a hydro-power project. However, where such structures will affect the navigable capacity of any navigable water of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a DA recommendation to FERC for the inclusion of appropriate provisions in the FERC license rather than the issuance of a separate DA permit under 33 U.S.C. 401 *et seq.* As to any other activities in navigable waters not constituting construction and the operation and maintenance of physical structures licensed by FERC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 *et seq.* remain fully applicable. In all cases involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of disposal in ocean waters, section 404 or section 103 will be applicable.

(g) The National Historic Preservation Act of 1966 (16 U.S.C. 470) created the Advisory Council on Historic Preservation to advise the President and Congress on matters involving historic preservation. In performing its function the Council is authorized to review and comment upon activities licensed by the Federal Government which will have an effect upon properties listed in the National Register of Historic Places, or eligible for such listing. The concern of Congress for the preservation of significant historical sites is also expressed in the Preservation of Historical and Archeological Data Act of 1974 (16 U.S.C. 469 *et seq.),* which amends the Act of June 27, 1960. By this Act, whenever a federal construction project or federally licensed project, activity, or program alters any terrain such that significant historical or archeological data is threatened, the Secretary of the Interior may take action necessary to recover and preserve the data prior to the commencement of the project.

(h) The Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 *et seq.)* prohibits any developer or agent from selling or leasing any lot in a subdivision (as defined in 15 U.S.C. 1701(3)) unless the purchaser is furnished in advance a printed property report containing information which the Secretary of Housing and Urban Development may, by rules or regulations, require for the protection of purchasers. In the event the lot in question is part of a project that requires DA authorization, the property report is required by Housing and Urban Development regulation to state whether

or not a permit for the development has been applied for, issued, or denied by the Corps of Engineers under section 10 or section 404. The property report is also required to state whether or not any enforcement action has been taken as a consequence of non-application for or denial of such permit.

(i) The Endangered Species Act (16 U.S.C. 1531 *et seq.)* declares the intention of the Congress to conserve threatened and endangered species and the ecosystems on which those species depend. The Act requires that federal agencies, in consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, use their authorities in furtherance of its purposes by carrying out programs for the conservation of endangered or threatened species, and by taking such action necessary to insure that any action authorized, funded, or carried out by the Agency is not likely to jeopardize the continued existence of such endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary of the Interior or Commerce, as appropriate, to be critical. (See 50 CFR Part 17 and 50 CFR Part 402.)

(j) The Deepwater Port Act of 1974 (33 U.S.C. 1501 *et seq.)* prohibits the ownership, construction, or operation of a deepwater port beyond the territorial seas without a license issued by the Secretary of Transportation. The Secretary of Transportation may issue such a license to an applicant if he determines, among other things, that the construction and operation of the deepwater port is in the national interest and consistent with national security and other national policy goals and objectives. An application for a deepwater port license constitutes an application for all federal authorizations required for the ownership, construction, and operation of a deepwater port, including applications for section 10, section 404 and section 103 permits which may also be required pursuant to the authorities listed in section 320.2 and the policies specified in section 320.4 of this Part.

(k) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 *et seq.)* expresses the intent of Congress that marine mammals be protected and encouraged to develop in order to maintain the health and stability of the marine ecosystem. The Act imposes a perpetual moratorium on the harassment, hunting, capturing, or killing of marine mammals and on the importation of marine mammals and marine mammal products without a permit from either the Secretary of the Interior or the Secretary of Commerce, depending upon the species of marine mammal involved. Such permits may be issued only for purposes of scientific research and for public display if the purpose is consistent with the policies of the Act. The appropriate Secretary is also empowered in certain restricted circumstances to waive the requirements of the Act.

(l) Section 7(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1278 *et seq.)* provides that no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration.

(m) The Ocean Thermal Energy Conversion Act of 1980, (42 U.S.C. section 9101 *et seq.)* establishes a licensing regime administered by the Administrator of NOAA for the ownership, construction, location, and operation of ocean thermal energy conversion (OTEC) facilities and plantships. An application for an OTEC license filed with the Administrator constitutes an application for all federal authorizations required for ownership, construction, location, and operation of an OTEC facility or plantship, except for certain activities within the jurisdiction of the Coast Guard. This includes applications for section 10, section 404, section 103 and other DA authorizations which may be required.

(n) Section 402 of the Clean Water Act authorizes EPA to issue permits under procedures established to implement the National Pollutant Discharge Elimination System (NPDES) program. The administration of this program can be, and in most cases has been, delegated to individual states. Section 402(b)(6) states that no NPDES permit will be issued if the Chief of Engineers, acting for the Secretary of the Army and after consulting with the U.S. Coast Guard, determines that navigation and anchorage in any navigable water will be substantially impaired as a result of a proposed activity.

(o) The National Fishing Enhancement Act of 1984 (Pub. L. 98—623) provides for the development of a National Artificial Reef Plan to promote and facilitate responsible and effective efforts to establish artificial reefs. The Act establishes procedures to be followed by the Corps in issuing DA permits for artificial reefs. The Act also establishes the liability of the permittee and the United States. The Act further creates a civil penalty for violation of any provision of a permit issued for an artificial reef.

§ 320.4 General policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for DA permits. Additional policies specifically applicable to certain types of activities are identified in 33 CFR Parts 321—324.

(a) *Public Interest Review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns. wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (see § § 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(i) The relative extent of the public and private need for the proposed structure or work:

(ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and

(iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

(3) The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another. However, full consideration and appropriate weight will be given to all comments, including those of federal, state, and local agencies, and other experts on matters within their expertise.

(b) *Effect on wetlands,* (1) Most wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest. For projects to be undertaken or partially or entirely funded by a federal, state, or local agency, additional requirements on wetlands considerations are stated in Executive Order 11990, dated 24 May 1977.

(2) Wetlands considered to perform functions important to the public interest include:

(i) Wetlands which serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species;

(ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;

(iii) Wetlands the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns. salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;

(iv) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars;

(v) Wetlands which serve as valuable storage areas for storm and flood waters;

(vi) Wetlands which are ground water discharge areas that maintain minimum baseflows important to aquatic resources and those which are prime natural recharge areas;

(vii) Wetlands which serve significant water purification functions; and

(viii) Wetlands which are unique in nature or scarce in quantity to the region or local area.

(3) Although a particular alteration of a wetland may constitute a minor change, the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it may be part of a complete and interrelated wetland area. In addition, the district engineer may undertake, where appropriate, reviews of particular wetland areas in consultation with the Regional Director of the The. U.S. Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate state agency to assess the cumulative effect of activities in such areas.

(4) No permit will be granted which involves the alteration of wetlands identified as important by paragraph (b)(2) of this section or because of provisions of paragraph (b)(3), of this section unless the district engineer concludes, on the basis of the analysis required in paragraph (a) of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource. In evaluating whether a particular discharge activity should be permitted, the district engineer shall apply the section 404(b)(1) guidelines (40 CFR Part 230.10(a) (1), (2), (3)).

(5) In addition to the policies expressed in this subpart, the Congressional policy expressed in the Estuary Protection Act, Pub. L. 90-454, and state regulatory laws or programs for classification and protection of wetlands will be considered.

(c) *Fish and wildlife.* In accordance with the Fish and Wildlife Coordination Act (paragraph 320.3(e) of this section) district engineers will consult with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. The Army will give full consideration to the views of those agencies on fish and wildlife matters in deciding on the issuance, denial, or conditioning of individual or general permits.

(d) *Water quality.* Applications for permits for activities which may adversely affect the quality of waters of the United States will be evaluated for compliance with applicable effluent limitations and water quality standards, during the construction and subsequent operation of the proposed activity. The evaluation should include the consideration of both point and non-point sources of pollution. It should be noted, however, that the Clean Water Act assigns responsibility for control of non-point sources of pollution to the states. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of section 401 of the Clean Water Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration.

(e) *Historic, cultural, scenic, and recreational values.* Applications for DA permits may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers, historic properties and National Landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, estuarine and marine sanctuaries, archeological resources, including Indian religious or cultural sites, and such other areas as may be established under federal or state law for similar and related purposes. Recognition of those values is often reflected by state, regional, or local land use classifications, or by similar federal controls or policies. Action on permit applications should, insofar as possible, be consistent with, and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established.

(f) *Effects on limits of the territorial sea.* Structures or work affecting coastal waters may modify the coast line or base line from which the territorial sea is measured for purposes of the Submerged Lands Act and international law. Generally, the coast line or base line is the line of ordinary low water on

the mainland; however, there are exceptions where there are islands or lowtide elevations offshore (the Submerged Lands Act, 43 U.S.C. 1301(a) and *United States* v. *California*, 381 U.S.C. 139 (1965), 382 U.S. 448 (1966)). Applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The district engineer will submit a description of the proposed work and a copy of the plans to the Solicitor, Department of the Interior, Washington, DC 20240, and request his comments concerning the effects of the proposed work on the outer continental rights of the United States. These comments will be included in the administrative record of the application. After completion of standard processing procedures, the record will be forwarded to the Chief of Engineers. The decision on the application will be made by the Secretary of the Army after coordination with the Attorney General.

(g) *Consideration of property ownership.* Authorization of work or structures by DA does not convey a property right, nor authorize any injury to property or invasion of other rights.

(1) An inherent aspect of property ownership is a right to reasonable private use. However, this right is subject to the rights and interests of the public in the navigable and other waters of the United States, including the federal navigation servitude and federal regulation for environmental protection.

(2) Because a landowner has the general right to protect property from erosion, applications to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of others, adversely affect public health and safety, adversely impact floodplain or wetland values, or otherwise appears contrary to the public interest, the district engineer will so advise the applicant and inform him of possible alternative methods of protecting his property. Such advice will be given in terms of general guidance only so as not to compete with private engineering firms nor require undue use of government resources.

(3) A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface. In the case of proposals which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied.

(4) Where it is found that the work for which a permit is desired is in navigable waters of the United States (see 33 CFR Part 329) and may interfere with an authorized federal project, the applicant should be apprised in writing of the fact and of the possibility that a federal project which may be constructed in the vicinity of the proposed work might necessitate its removal or reconstruction. The applicant should also be informed that the United States will in no case be liable for any damage or injury to the structures or work authorized by Sections 9 or 10 of the Rivers and Harbors Act of 1899 or by section 404 of the Clean Water Act which may be caused by, or result from, future operations undertaken by the Government for the conservation or improvement of navigation or for other purposes, and no claims or right to compensation will accrue from any such damage.

(5) Proposed activities in the area of a federal project which exists or is under construction will be evaluated to insure that they are compatible with the purposes of the project.

(6) A DA permit does not convey any property rights, either in real estate or material, or any exclusive privileges. Furthermore, a DA permit does not authorize any injury to property or invasion of rights or any infringement of Federal, state or local laws or regulations. The applicant's signature on an application is an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application. The district engineer will not enter into disputes but will remind the applicant of the above. The dispute over property ownership will not be a factor in the Corps public interest decision.

(h) *Activities affecting coastal zones.* Applications for DA permits for activities affecting the coastal zones of those states having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will be issued to a non-federal applicant until certification has been provided that the proposed activity complies with the coastal zone management program and the appropriate state agency has concurred with the certification or has waived its right to do so. However, a permit may be issued to a non-federal applicant if the Secretary of Commerce, on his own initiative or upon appeal by the applicant, finds that the proposed activity is consistent with the objectives of the Coastal Zone Management Act of 1972 or is otherwise necessary in the interest of national security. Federal agency and Indian tribe applicants for DA permits are responsible for complying with the Coastal Zone Management Act's directives for assuring that their activities directly affecting the coastal zone are consistent, to the maximum extent practicable, with approved state coastal zone management programs.

(i) *Activities in marine sanctuaries.* Applications for DA authorization for activities in a marine sanctuary established by the Secretary of Commerce under authority of section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, will be evaluated for impact on the marine sanctuary. No permit will be issued until the applicant provides a certification from the Secretary of Commerce that the proposed activity is consistent with the purposes of Title Ill of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and can be carried out within the regulations promulgated by the Secretary of Commerce to control activities within the marine sanctuary.

(j) *Other Federal, state, or local requirements.* (1) Processing of an application for a DA permit normally will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications. Final action on the DA permit will normally not be delayed pending action by another Federal, state or local agency (See 33 CFR 325.2 (d)(4)). However, where the required Federal, state and/or local authorization and/or certification has been denied for activities which also require a Department of the Army permit before final action has been taken on the Army permit application, the district engineer will, after considering the likelihood of subsequent approval of the other authorization and/or certification and the time and effort remaining to complete processing the Army permit application, either immediately deny the Army permit without prejudice or continue processing the application to a conclusion. If the district engineer continues processing the application, he will conclude by either denying the permit as contrary to the public interest, or denying it without prejudice indicating that except for the other Federal, state or local denial the Army permit could, under appropriate conditions, be issued. Denial without prejudice means that there is no prejudice to the right of the applicant to reinstate processing of the Army permit

application if subsequent approval is received from the appropriate Federal. state and/or local agency on a previously denied authorization and/or certification, Even if official certification and/or authorization is not required by state or federal law, but a state, regional, or local agency having jurisdiction or interest over the particular activity comments on the application, due consideration shall be given to those official views as a reflection of local factors of the public interest.

(2) The primary responsibility for determining zoning and land use matters rests with state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include but are not necessarily limited to national security, navigation, national economic development, water quality, preservation of special aquatic areas, including wetlands, with significant interstate importance, and national energy needs. Whether a factor has overriding importance will depend on the degree of impact in an individual case.

(3) A proposed activity may result in conflicting comments from several agencies within the same state. Where a state has not designated a single responsible coordinating agency, district engineers will ask the Governor to express his views or to designate one state agency to represent the official state position in the particular case.

(4) In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR Parts 320—324, and the applicable statutes have been considered and followed: e.g., the National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archeological Preservation Act; the National Historic Preservation Act; the Endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the Clean Water Act, the Archeological Resources Act, and the American Indian Religious Freedom Act. Similarly, a permit will generally be issued for Federal and Federally-authorized activities; another federal agency's determination to proceed is entitled to substantial consideration in the Corps' public interest review.

(5) Where general permits to avoid duplication are not practical, district engineers shall develop joint procedures with those local, state, and other Federal agencies having ongoing permit programs for activities also regulated by the Department of the Army. In such cases, applications for DA permits may be processed jointly with the state or other federal applications to an independent conclusion and decision by the district engineer and the appropriate Federal or state agency. (See 33 CF'R 325.2(e).)

(6) The district engineer shall develop operating procedures for establishing official communications with Indian Tribes within the district. The procedures shall provide for appointment of a tribal representative who will receive all pertinent public notices, and respond to such notices with the official tribal position on the proposed activity. This procedure shall apply only to those tribes which accept this option. Any adopted operating procedures shall be distributed by public notice to inform the tribes of this option.

(k) *Safety of impoundment structures.* To insure that all impoundment structures are designed for safety, non-Federal applicants may be required to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons and, in appropriate cases, that the design has been independently reviewed (and modified as the review would indicate) by similarly qualified persons.

(1) Floodplain management. (1) Floodplains possess significant natural values and carry out numerous functions important to the public interest. These include:

(i) Water resources values (natural moderation of floods, water quality maintenance, and groundwater recharge);

(ii) Living resource values (fish, wildlife, and plant resources);

(iii) Cultural resource values (open space, natural beauty, scientific study, outdoor education, and recreation); and

(iv) Cultivated resource values (agriculture, aquaculture, and forestry).

(2) Although a particular alteration to a floodplain may constitute a minor change, the cumulative impact of such changes may result in a significant degradation of floodplain values and functions and in increased potential for harm to upstream and downstream activities. In accordance with the requirements of Executive Order 11988, district engineers, as part of their public interest review, should avoid to the extent practicable, long and short term significant adverse impacts associated with the occupancy and modification of floodplains, as well as the direct and indirect support of floodplain development whenever there is a practicable alternative. For those activities which in the public interest must occur in or impact upon floodplains, the district engineer shall ensure, to the maximum extent practicable, that the impacts of potential flooding on human health, safety, and welfare are minimized, the risks of flood losses are minimized, and, whenever practicable the natural and beneficial values served by floodplains are restored and preserved.

(3) In accordance with Executive Order 11988, the district engineer should avoid authorizing floodplain developments whenever practicable alternatives exist outside the floodplain. If there are no such practicable alternatives, the district engineer shall consider, as a means of mitigation, alternatives within the floodplain which will lessen any significant adverse impact to the floodplain.

(m) *Water supply and conservation.* Water is an essential resource, basic to human survival, economic growth, and the natural environment. Water conservation requires the efficient use of water resources in all actions which involve the significant use of water or that significantly affect the availability of water for alternative uses including opportunities to reduce demand and improve efficiency in order to minimize new supply requirements. Actions affecting water quantities are subject to Congressional policy as stated in section 101(g) of the Clean Water Act which provides that the authority of states to allocate water quantities shall not be superseded, abrogated, or otherwise impaired.

(n) *Energy conservation and development.* Energy conservation and development are major national objectives. District engineers will give high priority to the processing of permit actions involving energy projects.

(o) *Navigation.* (1) Section 11 of the Rivers and Harbors Act of 1899 authorized establishment of harbor lines shoreward of which no individual permits were required. Because harbor lines were established on the basis of navigation impacts only, the Corps of Engineers published a regulation on 27 May 1970 (33 CFR 209.150) which declared that permits would thereafter be required for activities shoreward of the harbor lines. Review of applications

would be based on a full public interest evaluation and harbor lines would serve as guidance for assessing navigation impacts. Accordingly, activities constructed shoreward of harbor lines prior to 27 May 1970 do not require specific authorization.

(2) The policy of considering harbor lines as guidance for assessing impacts on navigation continues.

(3) Protection of navigation in all navigable waters of the United States continues to be a primary concern of the federal government.

(4) District engineers should protect navigational and anchorage interests in connection with the NPDES program by recommending to EPA or to the state, if the program has been delegated, that a permit be denied unless appropriate conditions can be included to avoid any substantial impairment of navigation and anchorage.

(p) *Environmental benefits.* Some activities that require Department of the Army permits result in beneficial effects to the quality of the environment. The district engineer will weigh these benefits as well as environmental detriments along with other factors of the public interest.

(q) *Economics.* When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place. However, the district engineer in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest. The economic benefits of many projects are important to the local community and contribute to needed improvements in the local economic base, affecting such factors as employment, tax revenues, community cohesion, community services, and property values. Many projects also contribute to the National Economic Development (NED), (i.e., the increase in the net value of the national output of goods and services).

(r) *Mitigation*[1] (1) Mitigation is an important aspect of the review and balancing process on many Department of the Army permit applications. Consideration of mitigation will occur throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses. Losses will be avoided to the extent practicable. Compensation may occur on-site or at an off-site location. Mitigation requirements generally fall into three categories.

(i) Project modifications to minimize adverse project impacts should be discussed with the applicant at pre-application meetings and during application processing. As a result of these discussions and as the district engineer's evaluation proceeds, the district engineer may require minor project modifications. Minor project modifications are those that are considered feasible (cost, constructability, etc.) to the applicant and that, if adopted, will result in a project that generally meets the applicant's purpose and need. Such modifications can include reductions in scope and size; changes in construction methods, materials or timing; and operation and maintenance practices or other similar modifications that reflect a sensitivity to environmental quality within the context of the work proposed. For example, erosion control features could be required on a fill project to reduce sedimentation impacts or a pier could be reoriented to minimize navigational problems even though those projects may satisfy all legal requirements (paragraph (r)(1)(ii) of this section) and the public interest review test (paragraph (r)(1)(iii) of this section) without such modifications,

(ii) Further mitigation measures may be required to satisfy legal requirements. For Section 404 applications, mitigation shall be required to ensure that the project complies with the 404(b)(1) Guidelines. Some mitigation measures are enumerated at 40 CFR 230.70 through 40 CFR 230.77 (Subpart H of the 404(b)(1) Guidelines).

(iii) Mitigation measures in addition to those under paragraphs (r)(1) (i) arid (ii) of this section may be required as a result of the public interest review process. (See 33 CFR 325.4(a).) Mitigation should be developed and incorporated within the public interest review process to the extent that the mitigation is found by the district engineer to be reasonable and justified. Only those measures required to ensure that the project is not contrary to the public interest may be required under this subparagraph.

(2) All compensatory mitigation will be for significant resource losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment. Also, all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable. District engineers will require all forms of mitigation, including compensatory mitigation, only as provided in paragraphs (r)(1) (i) through (iii) of this section. Additional mitigation may be added at the applicants' request.

[1]This is a general statement of mitigation policy which applies to all Corps of Engineers regulatory authorities covered by these regulations (33 CFR Parts 320—330). It is not a substitute for the mitigation requirements necessary to ensure that a permit action under section 404 of the Clean Water Act complies with the section 404(h)(1) Guidelines. There is currently an interagency Working Group formed to develop guidance on implementing mitigation requirements of the Guidelines.

PART 321—PERMITS FOR DAMS AND DIKES IN NAVIGABLE WATERS OF THE UNITED STATES

Sec.

Authority: 33 U.S.C. 401.

§ 321.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army (DA) permits to authorize the construction of a dike or dam in a navigable water of the United States pursuant to section 9 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401). See 33 CFR 320.2(a). Dams and dikes in navigable waters of the United States also require DA permits under section 404 of the Clean Water Act, as amended (33 U.S.C. 1344). Applicants for DA permits under this Part should also refer to 33 CFR Part 323 to satisfy the requirements of section 404.

§ 321.2 Definitions.

For the purpose of this regulation. the following terms are defined:

(a) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean water nark and/or are presently used, or have been used in past, or may be susceptible to use to transport interstate or foreign commerce. See 33 CFR Part 329 for a more complete definition of this term.

(b) The term "dike or dam" means, for the purposes of section 9, any impoundment structure that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce. The term does not include a weir. Weirs are regulated pursuant to section 10 of the Rivers and Harbors Act of 1899. (See 33 CFR Part 322.)

§ 321.3 Special policies and procedures.

The following additional special policies and procedures shall be applicable to the evaluation of permit applications under this regulation:

(a) The Assistant Secretary of the Army (Civil Works) will decide whether DA authorization for a darn or dike in an interstate navigable water of the United States will be issued, since this authority has not been delegated to the Chief of Engineers. The conditions to be imposed in any instrument of authorization will be recommended by the district engineer when forwarding the report to the Assistant Secretary of the Army (Civil Works), through the Chief of Engineers.

(b) District engineers are authorized to decide whether DA authorization for a dam or dike in an intrastate navigable water of the United States will be issued (see 33 CFR 325.8).

(c) Processing a DA application under section 9 will not be completed until the approval of the United States Congress has been obtained if the navigable water of the United States is an interstate waterbody, or until the approval of the appropriate state legislature has been obtained if the navigable water of the United States is an intrastate waterbody (i.e., the navigable portion of the navigable water of the United States is solely within the boundaries of one state). The district engineer, upon receipt of such an application, will notify the applicant that the consent of Congress or the state legislature must be obtained before a permit can be issued.

PART 322—PERMITS FOR STRUCTURES OR WORK IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES

Sec.

Authority: 33 U.S.C. 403.

§ 322.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army (DA) permits to authorize certain structures or work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) (hereinafter referred to as section 10). See 33 CFR 320.2(b). Certain structures or work in or affecting navigable waters of the United States are also regulated under other authorities of the DA. These include discharges of dredged or fill material into waters of the United States, including the territorial seas, pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344; see 33 CFR Part 323) and the transportation of dredged material by vessel for purposes of dumping in ocean waters, including the territorial seas, pursuant to section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413; see 33 CFR Part 324). A DA permit will also be required under these additional authorities if they are applicable to structures or work in or affecting navigable waters of the United States. Applicants for DA permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 322.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "navigable waters of the United States" and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR Part 329. Generally, they are those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce.

(b) The term "structure" shall include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.

(c) The term "work" shall include, without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.

(d) The term "letter of permission" means a type of individual permit issued in accordance with the abbreviated procedures of 33 CFR 325.2(e).

(e) The term "individual permit" means a DA authorization that i8 issued following a case-by-case evaluation of a specific structure or work in accordance with the procedures of this regulation and 33 CFR Part 325, and a determination that the proposed structure or work is in the public interest pursuant to 33 CFR Part 320.

(f) The term "general permit" means a DA authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

(1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) The general permit would result in avoiding unnecessary duplication of the regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330.)

(g) The term "artificial reef" means a structure which is constructed or placed in the navigable waters of the United States or in the waters overlying the outer continental shelf for the purpose of enhancing fishery resources and commercial and recreational fishing opportunities. The term does not include activities or structures such as wing deflectors, bank stabilization, grade stabilization structures, or low flow key ways, all of which may be useful to enhance fisheries resources.

§ 322.3 Activities requiring permits.

(a) *General.* DA permits are required under section 10 for structures and/or work in or affecting navigable waters of the United States except as otherwise provided in § 322.4 below. Certain activities specified in 33 CFR Part 330 are permitted by that regulation ("nationwide general permits"). Other activities may be authorized by district or division engineers on a regional basis ("regional general permits"). If an activity is not exempted by section 322.4 of this part or authorized by a general permit, an individual section 10 permit will be required for the proposed activity. Structures or work are in navigable waters of the United States if they are within limits defined in 33 CFR Part 329. Structures or work outside these limits are subject to the provisions of law cited in paragraph (a) of this section, if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity. For purposes of a section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody.

(b) *Outer continental shelf* DA permits are required for the construction

of artificial islands, installations, and other devices on the seabed, to the seaward limit of the outer continental shelf, pursuant to section 4(f) of the Outer Continental Shelf Lands Act as amended. (See 33 CF'R 320.2(b).)

(c) *Activities of Federal agencies.* (1) Except as specifically provided in this paragraph, activities of the type described in paragraphs (a) and (b) of this section, done by or on behalf of any Federal agency are subject to the authorization procedures of these regulations. Work or structures in or affecting navigable waters of the United States that are part of the civil works activities of the Corps of Engineers, unless covered by a nationwide or regional general permit issued pursuant to these regulations, are subject to the procedures of separate regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under this regulation. Division and district engineers will therefore advise Federal agencies accordingly, and cooperate to the fullest extent in expediting the processing of their applications.

(2) Congress has delegated to the Secretary of the Army in section 10 the duty to authorize or prohibit certain work or structures in navigable waters of the United States, upon recommendation of the Chief of Engineers. The general legislation by which Federal agencies are empowered to act generally is not considered to be sufficient authorization by Congress to satisfy the purposes of section 10. If an agency asserts that it has Congressional authorization meeting the test of section 10 or would otherwise be exempt from the provisions of section 10, the legislative history and/or provisions of the Act should clearly demonstrate that Congress was approving the exact location and plans from which Congress could have considered the effect on navigable waters of the United States or that Congress intended to exempt that agency from the requirements of section 10. Very often such legislation reserves final approval of plans or construction for the Chief of Engineers. In such cases evaluation and authorization under this regulation are limited by the intent of the statutory language involved.

(3) The policy provisions set out in 33 CFR 320.4(j) relating to state or local certifications and/or authorizations, do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy, e.g., section 313 and section 401 of the Clean Water Act.

§ 322.4 Activities not requiring permits.

(a) Activities that were commenced or completed shoreward of established Federal harbor lines before May 27, 1970 (see 33 CFR 320.4(o)) do not require section 10 permits; however, if those activities involve the discharge of dredged or fill material into waters of the United States after October 18, 1972. a section 404 permit is required (See 33 CFR Part 323.)

(b) Pursuant to section 154 of the Water Resource Development Act of 1976 (Pub. L. 94—587), Department of the Army permits are not required under section 10 to construct wharves and piers in any waterbody, located entirely within one state, that is a navigable water of the United States solely on the basis of its historical use to transport interstate commerce,

§ 322.5 Special policies.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 10 permits. The following additional special policies and procedures shall also be applicable to the evaluation of permit applications under this regulation.

(a) *General.* DA permits are required for structures or work in or affecting navigable waters of the United States. However, certain structures or work specified in 33 CFR Part 330 are permitted by that regulation. If a structure or work is not permitted by that regulation, an individual or regional section 10 permit will be required.

(b) *Artificial Reefs.* (1) When considering an application for an artificial reef, as defined in 33 CFR 322.2(g), the district engineer will review the applicant's provisions for siting, constructing, monitoring, operating, maintaining, and managing the proposed artificial reef and shall determine if those provisions are consistent with the following standards:

(i) The enhancement of fishery resources to the maximum extent practicable;

(ii) The facilitation of access and utilization by United States recreational and commercial fishermen;

(iii) The minimization of conflicts. among competing uses of the navigable waters or waters overlying the outer continental shelf and of the resources in such waters;

(iv) The minimization of environmental risks and risks to personal health and property;

(v) Generally accepted principles of international law; and

(vi) the prevention of any unreasonable obstructions to navigation. If the district engineer decides that the applicant's provisions are not consistent with these standards, he shall deny the permit. If the district engineer decides that the provisions are consistent with these standards, and if he decides to issue the permit after the public interest review, he shall make the provisions part of the permit.

(2) In addition, the district engineer will consider the National Artificial Reef Plan developed pursuant to section 204 of the National Fishing Enhancement Act of 1984, and if he decides to issue the permit, will notify the Secretary of Commerce of any need to deviate from that plan.

(3) The district engineer will comply with all coordination provisions required by a written agreement between the DOD and the Federal agencies relative to artificial reefs. In addition, if the district engineer decides that further consultation beyond the normal public commenting process is required to evaluate fully the proposed artificial reef, he may initiate such consultation with any Federal agency. state or local government, or other interested party.

(4) The district engineer will issue a permit for the proposed artificial reef only if the applicant demonstrates, to the district engineer's satisfaction, that the title to the artificial reef construction material is unambiguous, that responsibility for maintenance of the reef is clearly established, and that he has the financial ability to assume liability for all damages that may arise with respect to the proposed artificial reef. A demonstration of financial responsibility might include evidence of insurance, sponsorship, or available assets.

(i) A person to whom a permit is issued in accordance with these regulations and any insurer of that person shall not be liable for damages caused by activities required to be undertaken under any terms and conditions of the permit, if the permittee is in compliance with such terms and conditions.

(ii) A person to whom a permit is issued in accordance with these regulations and any insurer of that person shall be liable, to the extent determined under applicable law, for damages to which paragraph (i) does not apply.

(iii) Any person who has transferred title to artificial reef construction materials to a person to whom a permit is issued in accordance with these regulations shall not be liable for damages arising from the use of such materials in an artificial reef, if such materials meet applicable requirements

of the plan published under section 204 of the National Artificial Reef Plan, and are not otherwise defective at the time title is transferred.

(c) *Non-Federal dredging for navigation.* (1) The benefits which an authorized Federal navigation project are intended to produce will often require similar and related operations of non-Federal agencies (e.g., dredging access channels to docks and berthing facilities or deepening such channels to correspond to the Federal project depth). These non-Federal activities will be considered by Corps of Engineers officials in planning the construction and maintenance of Federal navigation projects and, to the maximum practical extent, will be coordinated with interested Federal, state, regional and local agencies and the general public simultaneously with the associated Federal projects. Non-Federal activities which are not so coordinated will be individually evaluated in accordance with these regulations. in evaluating the public interest in connection with applications for permits for such coordinated operations, equal treatment will be accorded to the fullest extent possible to both Federal and non-Federal operations. Permits for non-Federal dredging operations will normally contain conditions requiring the permittee to com ply with the same practices or requirements utilized in connection with related Federal dredging operations with respect to such matters as turbidity, water quality, containment of material, nature and location of approved spoil disposal areas (non-Federal use of Federal contained disposal areas will be in accordance with laws authorizing such areas and regulations governing their use), extent and period of dredging, and other factors relating to protection of environmental and ecological values.

(2) A permit for the dredging of a channel, slip, or other such project for navigation may also authorize the periodic maintenance dredging of the project. Authorization procedures and limitations for maintenance dredging shall be as prescribed in 33 CFR 325.6(e). The permit will require the permittee to give advance notice to the district engineer each time maintenance dredging is to be performed. Where the maintenance dredging involves the discharge of dredged material into waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters, the procedures in 33 CFR Parts 323 and 324 respectively shall also be followed.

(d) *Structures for small boats.* (1) In the absence of overriding public interest. favorable consideration will generally be given to applications from riparian owners for permits for piers, boat docks, moorings, platforms and similar structures for small boats. Particular attention will be given to the location and general design of such structures to prevent possible obstructions to navigation with respect to both the public's use of the waterway and the neighboring proprietors' access to the waterway. Obstructions can result from both the existence of the structure, particularly in conjunction with other similar facilities in the immediate vicinity, and from its inability to withstand wave action or other forces which can be expected. District engineers will inform applicants of the hazards involved and encourage safety in location, design, and operation. District engineers will encourage cooperative or group use facilities in lieu of individual proprietary use facilities.

(2) Floating structures for small recreational boats or other recreational purposes in lakes controlled by the Corps of Engineers under a resource manager are normally subject to permit authorities cited in § 322.3, of this section, when those waters are regarded as navigable waters of the United States. However, such structures will not be authorized under this regulation but will be regulated under applicable regulations of the Chief of Engineers published in 36 CFR 327.19 if the land surrounding those lakes is under complete Federal ownership. District engineers will delineate those portions of the navigable waters of the United States where this provision is applicable and post notices of this designation *in* the vicinity of the lake resource manager's office.

(e) *Aids to navigation.* The placing of fixed and floating aids to navigation in a navigable water of the United States is within the purview of Section 10 of the Rivers and Harbors Act of 1899. Furthermore, these aids are of particular interest to the U.S. Coast Guard because of its control of marking, lighting and standardization of such navigation aids. A Section 10 nationwide permit has been issued for such aids provided they are approved by, and installed in accordance with the requirements of the U.S. Coast Guard (33 CFR 330.5(a)(1)). Electrical service cables to such aids are not included in the nationwide permit (an individual or regional Section 10 permit will be required).

(f) *Outer continental shelf* Artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf, are subject to the standard permit procedures of this regulation. Where the islands, installations and other devices are to be constructed on lands which are under mineral lease from the Mineral Management Service, Department of the Interior, that agency. in cooperation with other federal agencies, fully evaluates the potential effect of the leasing program on the total environment. Accordingly, the decision whether to issue a permit on lands which are under mineral lease from the Department of the Interior will be limited to an evaluation of the impact of the proposed work on navigation and national security. The public notice will so identify the criteria.

(g) *Canals and other artificial waterways connected to navigable waters of the United States.* A canal or similar artificial waterway is subject to the regulatory authorities discussed in § 322.3, of this Part, if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States a manner which affects their course, location, condition or capacity, or if at some point in its construction or operation it results in an effect on the course, location, condition, or capacity of navigable waters of the United States. In all cases the connection to navigable waters of he United States requires a permit. Where the canal itself constitutes a navigable water of the United States, evaluation of the permit application and further exercise of regulatory authority will be in accordance with the standard procedures of these regulations. For all other canals, the exercise of regulatory authority is restricted to those activities which affect the course, location, condition, or capacity of the navigable waters of the United States. The district engineer will consider, for applications for canal work, a proposed plan of the entire development and the location and description of anticipated docks, piers and other similar structures which will be placed in the canal.

(h) *Facilities at the borders of the United States.* (1) The construction operation, maintenance, or connection of facilities at the borders of the United States are subject to Executive control and must be authorized by the President, Secretary of State, or other delegated official.

(2) Applications for permits for the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country, or for the exportation or importation of natural

gas to or from a foreign country, must be made to the Secretary of Energy. (Executive Order 10485, September 3, 1953, 16 U.S.C. 824(a)(e), 15 U.S.C. 717(b), as amended by Executive Order 12038, February 3, 1978, and 18 CFR Parts 32 and 153).

(3) Applications for the landing or operation of submarine cables must be made to the Federal Communications Commission. (Executive Order 10530, May 10, 1954, 47 U.S.C. 34 to 39, and 47 CFR 1.766).

(4) The Secretary of State is to receive applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum products, coals, minerals, or other products to or from a foreign country; facilities for the exportation or importation of water or sewage to or from a foreign country; and monorails, aerial cable cars, aerial tramways, and similar facilities for the transportation of persons and/or things, to or from a foreign country. (Executive Order 11423, August 16, 1968).

(5) A DA permit under section 10 of the Rivers and Harbors Act of 1899 is also required for all of the above facilities which affect the navigable waters of the United States, but in each case in which a permit has been issued as provided above, the district engineer, in evaluating the general public interest, may consider the basic existence and operation of the facility to have been primarily examined and permitted as provided by the Executive Orders. Furthermore, in those cases where the construction, maintenance, or operation at the above facilities involves the discharge of dredged or fill material in waters of the United States or the transportation of dredged material for the purpose of dumping it into ocean waters, appropriate DA authorizations under section 404 of the Clean Water Act or under section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, are also required. (See 33 CFR Parts 323 and 324.)

(i) *Power transmission lines.* (1) Permits under section 10 of the Rivers and Harbors Act of 1899 are required for power transmission lines crossing navigable waters of the United States unless those lines are part of a water power project subject to the regulatory authorities of the Department of Energy under the Federal Power Act of 1920. If an application is received for a permit for lines which are part of such a water power project, the applicant will be instructed to submit the application to the Department of Energy. If the lines are not part of such a water power project, the application will be processed in accordance with the procedures of these regulations.

(2) The following minimum clearances are required for aerial electric power transmission lines crossing navigable waters of the United States. These clearances are related to the clearances over the navigable channel provided by existing fixed bridges, or the clearances which would be required by the U.S. Coast Guard for new fixed bridges, in the vicinity of the proposed power line crossing. The clearances are based on the low point of the line under conditions which produce the greatest sag, taking into consideration temperature, load, wind, length or span, and type of supports as outlined in the National Electrical Safety Code.

Nominal system voltage. KV	Minimum additional clearance (feet) above clearance required for bridges
115 and below	20
138	22
161	24
230	26
350	30
500	35
700	42
750—765	45

(3) Clearances for communication lines, stream gaging cables, ferry cables, and other aerial crossings are usually required to be a minimum of ten feet above clearances required for bridges. Greater clearances will be required if the public interest so indicates.

(4) Corps of Engineer regulation ER 1110—2—4401 prescribes minimum vertical clearances for power and communication lines over Corps lake projects. In instances where both this regulation and ER 1110—2—4401 apply. the greater minimum clearance is required.

(j) *Seaplane operations.* (1) Structures in navigable waters of the United States associated with seaplane operations require DA permits, but close coordination with the Federal Aviation Administration (FAA), Department of Transportation, is required on such applications.

(2) The FAA must be notified by an applicant whenever he proposes to establish or operate a seaplane base. The FAA will study the proposal and advise the applicant, district engineer, and other interested parties as to the effects of the proposal on the use of airspace. The district engineer will, therefore, refer any objections regarding the effect of the proposal on the use of airspace to the FAA, and give due consideration to its recommendations when evaluating the general public interest.

(3) If the seaplane base would serve air carriers licensed by the Department of Transportation, the applicant must receive an airport operating certificate from the FAA. That certificate reflects a determination and conditions relating to the installation, operation, and maintenance of adequate air navigation facilities and safety equipment. Accordingly, the district engineer may, in evaluating the general public interest, consider such matters to have been primarily evaluated by the FAA.

(4) For regulations pertaining to seaplane landings at Corps of Engineers projects, see 36 CFR 327.4.

(k) *Foreign trade zones.* The Foreign Trade Zones Act (48 Stat. 998—1003. 19 U.S.C. 81a to 81u, as amended) authorizes the establishment of foreign-trade zones in or adjacent to United States ports of entry under terms of a grant and regulations prescribed by the Foreign-Trade Zones Board. Pertinent regulations are published at Title 15 of the Code of Federal Regulations, Part 400. The Secretary of the Army is a member of the Board, and construction of a zone is under the supervision of the district engineer. Laws governing the navigable waters of the United States remain applicable to foreign-trade zones, including the general requirements of these regulations. Evaluation by a district engineer of a permit application may give recognition to the consideration by the Board of the general economic effects of the zone on local and foreign commerce, general location of wharves and facilities, and other factors pertinent to construction, operation, and maintenance of the zone

(l) *Shipping safety fairways and anchorage areas.* DA permits are required for structures located within shipping safety fairways and anchorage areas established by the U.S. Coast Guard.

(1) The Department of the Army will grant no permits for the erection of structures in areas designated as fairways, except that district engineers may permit temporary anchors and attendant cables or chains for floating or semisubmersible drilling rigs to be placed within a fairway provided the following conditions are met:

(i) The installation of anchors to stabilize semisubmersible drilling rigs within fairways must be temporary and shall be allowed to remain only 120 days. This period may be extended by the district engineer provided reasonable cause for such extension can

be shown and the extension is otherwise justified.

(ii) Drilling rigs must be at least 500 feet from any fairway boundary or whatever distance necessary to insure that minimum clearance over an anchor line within a fairway will be 125 feet.

(iii) No anchor buoys or floats or related rigging will be allowed on the surface of the water or to a depth of 125 feet from the surface, within the fairway.

(iv) Drilling rigs may not be placed closer than 2 nautical miles of any other drilling rig situated along a fairway boundary, and not closer than 3 nautical miles to any drilling rig located on the opposite side of the fairway.

(v) The permittee must notify the district engineer. Bureau of Land Management, Mineral Management Service, U.S. Coast Guard, National Oceanic and Atmospheric Administration and the U.S. Navy Hydrographic Office of the approximate dates (commencement and completion) the anchors will be in place to insure maximum notification to mariners.

(vi) Navigation aids or danger markings must be installed as required by the U.S. Coast Guard.

(2) District engineers may grant permits for the erection of structures within an area designated as an anchorage area, but the number of structures will be limited by spacing, as follows: The center of a structure to be erected shall be not less than two (2) nautical miles from the center of any existing structure. In a drilling or production complex, associated structures shall be as close together as practicable having due consideration for the safety factors involved. A complex of associated structures, when connected by walkways, shall be considered one structure for the purpose of spacing. A vessel fixed in place by moorings and used in conjunction with the associated structures of a drilling or production complex, shall be considered an attendant vessel and its extent shall include its moorings. When a drilling or production complex includes an attendant vessel and the complex extends more than five hundred (500) yards from the center or the complex, a structure to be erected shall be not closer than two (2) nautical miles from the near outer limit of the complex. An underwater completion installation in and anchorage area shall be considered a structure and shall be marked with a lighted buoy as approved by the United States Coast Guard.

PART 323—PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

Sec.

Authority: 33 U.S.C. 1344.

§ 323.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for DA permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344) (hereinafter referred to as section 404). (See 33 CFR 320.2(g).) Certain discharges of dredged or fill material into waters of the United States are also regulated under other authorities of the Department of the Army. These include dams and dikes in navigable waters of the United States pursuant to section 9 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401; see 33 CFR Part 321) and certain structures or work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403; see 33 CFR Part 322). A DA permit will also be required under these additional authorities if they are applicable to activities involving discharges of dredged or fill material into waters of the United States. Applicants for DA permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 323.2 Definitions.

For the purpose of this part. the following terms are defined:

(a) The term "waters of the United States" and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR Part 328.

(b) The term "lake" means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow. that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

(c) The term "dredged material" means material that is excavated or dredged from waters of the United States.

(d) The term "discharge of dredged material" means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). The term does not include *de minimis*, incidental soil movement occurring during normal dredging operations.

(e) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.

(f) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction: site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities,

intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms).

(g) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this part and 33 CFR Part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR Part 320.

(h) The term "general permit" means a Department of the Army authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

(1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) The general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330.)

§ 323.3 Discharges requiring permits.

(a) *General.* Except as provided in § 323.4 of this Part, DA permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in 33 CFR Part 330 are permitted by that regulation ("nationwide permits"). Other discharges may be authorized by district or division engineers on a regional basis ("regional permits"), If a discharge of dredged or fill material is not exempted by § 323.4 of this Part or permitted by 33 CFR Part 330. an individual or regional section 404 permit will be required for the discharge of dredged or fill material into waters of the United States.

(b) *Activities of Federal agencies.* Discharges of dredged or fill material into waters of the United States done by or on behalf of any Federal agency, other than the Corps of Engineers (see 33 CFR Part 209.145), are subject to the authorization procedures of these regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under the regulations. Division and district engineers will therefore advise Federal agencies and instrumentalities accordingly and cooperate to the fullest extent in expediting the processing of their applications.

§ 323.4 Discharges not requiring permits.

(a) *General.* Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii) (A) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.

(B) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(C)(1} Minor Drainage means:

(1) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. (Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit.);

(ii) The discharge of dredged or fill material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;

(iii) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of CWA, and which are in established use for the production of rice, cranberries, or other wetland crop species. (The provisions of paragraphs ***(a)(1)(iii)(C)(1)*** *(ii)* and ***(iii)*** of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.)

(iv) The discharges of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding. harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of discovery of such blockages in order to be eligible for exemption.

(2) Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example. silviculture to farming). In addition,

minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(D) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

(E) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Any activity with respect to which a state has an approved program under section 208(b)(4) of the CWA which meets the requirements of sections 208(b)(4) (B) and (C).

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These BMPs which must be applied to satisfy this provision shall include those detailed BMPs described in the state's approved program description pursuant to the requirements of 40 CFR Part 233.22(i), and shall also include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;

(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the U.S.;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained during and following construction to prevent erosion;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum;

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(viii) Borrow material shall be taken from upland sources whenever feasible;

(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(xi) The discharge shall not be located in the proximity of a public water supply intake;

(xii) The discharge shall not occur in areas of concentrated shellfish production;

(xiii) The discharge shall not occur in a component of the National Wild and Scenic River System;

(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and

(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(b) If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a) (1}—(6) of this section contains any toxic pollutant listed under section 307 of the CWA such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a Section 404 permit.

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1)—(6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States nay be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. For example, a

permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.

(d) Federal projects which qualify under the criteria contained in section 404(r) of the CWA are exempt from section 404 permit requirements, but may be subject to other state or Federal requirements.

§ 323.5 Program transfer to states.

Section 404(h) of the CWA allows the Administrator of the Environmental Protection Agency (EPA) to transfer administration of the section 404 permit program for discharges into certain waters of the United States to qualified states. (The program cannot be transferred for those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to the high tide line. including wetlands adjacent thereto). See 40 CFR Parts 233 and 124 for procedural regulations for transferring Section 404 programs to states. Once a state's 404 program is approved and in effect, the Corps of Engineers will suspend processing of section 404 applications in the applicable waters and will transfer pending applications to the state agency responsible for administering the program. District engineers will assist EPA and the states in any way practicable to effect transfer and will develop appropriate procedures to ensure orderly and expeditious transfer.

§ 323.6 Special policies and procedures.

(a) The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 404 permits. The district engineer will review applications for permits for the discharge of dredged or fill material into waters of the United States in accordance with guidelines promulgated by the Administrator, EPA, under authority of section 404(b)(1) of the CWA. (see 40 CFR Part 230.) Subject to consideration of any economic impact on navigation and anchorage pursuant to section 404(b)(2), a permit will be denied if the discharge that would be authorized by such a permit would not comply with the 404(b)(1) guidelines. If the district engineer determines that the proposed discharge would comply with the 404(b)(1) guidelines, he will grant the permit unless issuance would be contrary to the public interest.

(b) The Corps will not issue a permit where the regional administrator of EPA has notified the district engineer and applicant in writing pursuant to 40 CFR 231.3(a)(1) that he intends to issue a public notice of a proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification, of any defined area as a disposal site in accordance with section 404(c) of the Clean Water Act. However the Corps will continue to complete the administrative processing of the application while the section 404(c) procedures are underway including completion of final coordination with EPA under 33 CFR Part 325.

PART 324—PERMITS FOR OCEAN DUMPING OF DREDGED MATERIAL

Sec.
324.1 General.
324.2 Definitions.
324.3 Activities requiring permits.
324.4 Special procedures.

Authority: 33 U.S.C. 1413.

§ 324.1 General.

This regulation prescribes in addition to the general policies of 33 CFR Part 820 and procedures of 33 CFR Part 325, those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army (DA) permits to authorize the transportation of dredged material by vessel or other vehicle for the purpose of dumping it in ocean waters at dumping sites designated under 40 CFR Part 228 pursuant to section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413) (hereinafter referred to as section 103). See 33 CFR 320.2(h). Activities involving the transportation of dredged material for the purpose of dumping in the ocean waters also require DA permits under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) for the dredging in navigable waters of the United States. Applicants for DA permits under this Part should also refer to 33 CFR Part 322 to satisfy the requirements of Section 10.

§ 324.2 Definitions.

For the purpose of this regulation. the following terms are defined:

(a) The term "ocean waters" means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606: TIAS 5639).

(b) The term 'dredged material" means any material excavated or dredged from navigable waters of the United States,

(c) The term "transport" or "transportation" refers to the conveyance and related handling of dredged material by a vessel or other vehicle,

§ 324.3 Activities requiring permits.

(a) *General.* DA permits are required for the transportation of dredged material for the purpose of dumping it in ocean waters.

(b) *Activities of Federal agencies.* (1) The transportation of dredged material for the purpose of disposal in ocean waters done by or on behalf of any Federal agency other than the activities of the Corps of Engineers is subject to the procedures of this regulation. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under these regulations. Division and district engineers will therefore advise Federal agencies accordingly and cooperate to the fullest extent in the expeditious processing of their applications. The activities of the Corps of Engineers that involve the transportation of dredged material for disposal in ocean waters are regulated by 33 CFR 209.145.

(2) The policy provisions set out in 33 CFR 320.4(j) relating to state or local authorizations do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy. Federal agencies are responsible for conformance with such laws and policies. (See EO 12088. October 18, 1978.) Federal agencies are not required to obtain and provide certification of compliance with effluent limitations am.. water quality standards from state or interstate water pollution control agencies in connection with activities involving the transport of dredged material for dumping into ocean waters beyond the territorial sea.

§ 324.4 Special procedures.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 103 permits. The following additional procedures shall also be applicable under this regulation.

(a) *Public notice.* For all applications for section 103 permits, the district engineer will issue a public notice which shall contain the information specified in 33 CFR 325.3.

(b) *Evaluation.* Applications for permits for the transportation of dredged material for the purpose of dumping it in ocean waters will be evaluated to determine whether the proposed dumping will unreasonably degrade or endanger human health, welfare, amenities, or the marine environment, ecological systems or economic potentialities. District engineers will apply the criteria established by the Administrator of EPA pursuant to section 102 of the Marine Protection, Research and Sanctuaries Act of 1972 in making this evaluation. (See 40 CFR Parts 220—229) Where ocean dumping is determined to be necessary, the district engineer will, to the extent feasible, specify disposal sites using the recommendations of the Administrator pursuant to section 102(c) of the Act.

(c) *EPA review.* When the Regional Administrator, EPA, in accordance with 40 CFR 225.2(b), advises the district engineer, in writing, that the proposed dumping will comply with the criteria, the district engineer will complete his evaluation of the application under this part and 33 CFR Parts 320 and 325. If, however, the Regional Administrator advises the district engineer, in writing, that the proposed dumping does not comply with the criteria, the district engineer will proceed as follows:

(1) The district engineer will determine whether there is an economically feasible alternative method or site available other than the proposed ocean disposal site. If there are other feasible alternative methods or sites available, the district engineer will evaluate them in accordance with 33 CFR Parts 320, 322, 323, and 325 and this Part, as appropriate.

(2) If the district engineer determines that there is no economically feasible alternative method or site available, and the proposed project is otherwise found to be not contrary to the public interest, he will so advise the Regional Administrator setting forth his reasons for such determination. If the Regional Administrator has not removed his objection within 15 days, the district engineer will submit a report of his determination to the Chief of Engineers for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain the analysis of whether there are other economically feasible methods or sites available to dispose of the dredged material.

(d) *Chief of Engineers review.* The Chief of Engineers shall evaluate the permit application and make a decision to deny the permit or recommend its issuance. If the decision of the Chief of Engineers is that ocean dumping at the proposed disposal site is required because of the unavailability of economically feasible alternatives, he shall so certify and request that the Secretary of the Army seek a waiver from the Administrator, EPA, of the criteria or of the critical site designation in accordance with 40 CFR 225.4.

PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

Sec.

Authority: 33 U.S.C. 401 et seq.; 33 U.S. C. 1344: 33 USC 1413.

§ 325.1 Applications for permits.

(a) *General.* The processing procedures of this Part apply to any Department of the Army (DA) permit. Special procedures and additional information are contained in 33 CFR Parts 320 through 324, 327 and Part 330. This Part is arranged in the basic timing sequence used by the Corps of Engineers in processing applications for DA permits.

(b) *Pre-application consultation for major applications.* The district staff element having responsibility for administering, processing, and enforcing federal laws and regulations relating to the Corps of Engineers regulatory program shall be available to advise potential applicants of studies or other information foreseeably required for later federal action. The district engineer will establish local procedures and policies including appropriate publicity programs which will allow potential applicants to contact the district engineer or the regulatory staff element to request pre-application consultation. Upon receipt of such request, the district engineer will assure the conduct of an orderly process which may involve other staff elements and affected agencies (Federal, state, or local) and the public. This early process should be brief but thorough so that the potential applicant may begin to assess the viability of some of the more obvious potential alternatives in the application. The district engineer will endeavor, at this stage, to provide the potential applicant with all helpful information necessary in pursuing the application, including factors which the Corps must consider in its permit decision making process. Whenever the district engineer becomes aware of planning for work which may require a DA permit and which may involve the preparation of an environmental document, he shall contact the principals involved to advise them of the requirement for the permit(s) and the attendant public interest review including the development of an environmental document. Whenever a potential applicant indicates the intent to submit an application for work which may require the preparation of an environmental document, a single point of contact shall be designated within the district's regulatory staff to effectively coordinate the regulatory process, including the National Environmental Policy Act (NEPA) procedures and all attendant reviews, meetings, hearings, and other actions, including the scoping process if appropriate, leading to a decision by the district engineer. Effort devoted to this process should be commensurate with the likelihood of a permit application actually being submitted to the Corps. The regulatory staff coordinator shall maintain an open relationship with each potential applicant or his consultants so as to assure that the potential applicant is fully aware of the substance (both quantitative and qualitative) of the data required by the district engineer for use in preparing an environmental assessment or an environmental impact statement (EIS) in accordance with 33 CFR Part 230, Appendix B.

(c) *Application form.* Applicants for all individual DA permits must use the standard application form (ENG Form 4345, 0MB Approval No. OMB 49-R0420). Local variations of the application form for purposes of facilitating coordination with federal, state and local agencies may be used. The appropriate form may be obtained from the district office having

jurisdiction over the waters in which the activity is proposed to be located. Certain activities have been authorized by general permits and do not require submission of an application form but may require a separate notification.

(d) *Content of application.* (1) The application must include a complete description of the proposed activity including necessary drawings, sketches, or plans sufficient for public notice (detailed engineering plans and specifications are not required); the location. purpose and need for the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners; the location and dimensions of adjacent structures; and a list of authorizations required by other federal. interstate, state, or local agencies for the work, including all approvals received or denials already made. See § 325.3 for information required to be in public notices. District and division engineers are not authorized to develop additional information forms but may request specific information on a case-by-case basis. (See § 325.1(e)).

(2) All activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA permit would be required should be included in the same permit application. District engineers should reject, as Incomplete, any permit application which fails to comply with this requirement. For example, a permit application for a marina will include dredging required for access as well as any fill associated with construction of the marina.

(3) If the activity would involve dredging in navigable waters of the United States, the application must include a description of the type, composition and quantity of the material to be dredged, the method of dredging, and the site and plans for disposal of the dredged material.

(4) If the activity would include the discharge of dredged or fill material into the waters of the United States or the transportation of dredged material for the purpose of disposing of it in ocean waters the application must include the source of the material: the purpose of the discharge, a description of the type, composition and quantity of the material; the method of transportation and disposal of the material; and the location of the disposal site. Certification under section 401 of the Clean Water Act is required for such discharges into waters of the United States.

(5) If the activity would include the construction of a filled area or pile or float-supported platform the project description must include the use of, and specific structures to be erected on. the fill or platform.

(6) if the activity would involve the construction of an impoundment structure, the applicant may be required to demonstrate that the structure complies with established state dam safety criteria or that the structure has been designed by qualified persons and, in appropriate cases, independently reviewed (and modified as the review would indicate) by similarly qualified persons. No specific design criteria are to be prescribed nor i8 an independent detailed engineering review to be made by the district engineer.

(7) *Signature on application.* The application must be signed by the person who desires to undertake the proposed activity (i.e. the applicant) or by a duly authorized agent. When the applicant is represented by an agent, that information will be included in the space provided on the application or by a separate written statement. The signature of the applicant or the agent will be an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application, except where the lands are under the control of the Corps of Engineers, in which cases the district engineer will coordinate the transfer of the real estate and the permit action. An application may include the activity of more than one owner provided the character of the activity of each owner is similar and in the same general area and each owner submits a statement designating the same agent.

(8) If the activity would involve the construction or placement of an artificial reef, as defined in 33 CFR 322.2(g), in the navigable waters of the United States or in the waters overlying the outer continental shelf, the-application must include provisions for siting, constructing, monitoring, and managing the artificial reef.

(9) *Complete application.* An application will he determined to be complete when sufficient information is received to issue a public notice (See 33 CFR 325.1(d) and 325.3(a).) The issuance of a public notice will not be delayed to obtain information necessary to evaluate an application.

(a) *Additional information.* In addition to the information indicated in paragraph (d) of this section, the applicant will be required to furnish only such additional information as the district engineer deems essential to make a public interest determination including, where applicable, a determination of compliance with the section 404(b)(1) guidelines or ocean dumping criteria. Such additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.

(f) *Fees.* Fees are required for permits under section 404 of the Clean Water Act, section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and sections 9 and 10 of the Rivers and Harbors Act of 1899. A fee of $100.00 will be charged when the planned or ultimate purpose of the project is commercial or industrial in nature and is in support of operations that charge for the production, distribution or sale of goods or services. A $10.00 fee will be charged for permit applications when the proposed work is non-commercial in nature and would provide personal benefits that have no connection with a commercial enterprise. The final decision as to the basis for a fee (commercial vs. non-commercial) shall be solely the responsibility of the district engineer. No fee will be charged if the applicant withdraws the application at any time prior to issuance of the permit or if the permit is denied. Collection of the fee will be deferred until the proposed activity has been determined to be not contrary to the public interest. Multiple fees are not to be charged if more than one law is applicable. Any modification significant enough to require publication of a public notice will also require a fee. No fee will be assessed when a permit is transferred from one property owner to another. No fees will be charged for time extensions, general permits or letters of permission. Agencies or instrumentalities of federal, state or local governments will not be required to pay any fee in connection with permits.

§ 325.2 Processing of applications.

(a) *Standard procedures.* (1) When an application for a permit is received the district engineer shall immediately assign it a number for identification, acknowledge receipt thereof. and advise the applicant of the number assigned to it. He shall review the application for completeness, and if the application is incomplete, request from the applicant within 15 days of receipt of the application any additional information necessary for further processing.

(2) Within 15 days of receipt of an application the district engineer will either determine that the application is complete (see 33 CFR 325.l(d)(9) and issue a public notice as described in § 325.3 of this Part, unless specifically exempted by other provisions of this

regulation or that it is incomplete and notify the applicant of the information necessary for a complete application. The district engineer will issue a supplemental, revised, or corrected public notice if in his view there is a change in the application data that would affect the public's review of the proposal.

(3) The district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application. Receipt of the comments will be acknowledged, if appropriate, and they will be made a part of the administrative record of the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another federal agency, the district engineer may seek the advice of that agency. if the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his views on such issue to the district engineer (see § 325.2(d)(5)). At the earliest practicable time other substantive comments will be furnished to the applicant for his information and any views he may wish to offer. A summary of the comments, the actual letters or portions thereof, or representative comment letters may be furnished to the applicant. The applicant may voluntarily elect to contact objectors in an attempt to resolve objections but will not be required to do so. District engineers will ensure that all parties are informed that the Corps alone is responsible for reaching a decision on the merits of any application. The district engineer may also offer Corps regulatory staff to be present at meetings between applicants and objectors, where appropriate, to provide information on the process, to mediate differences, or to gather information to aid in the decision process. The district engineer should not delay processing of the application unless the applicant requests a reasonable delay, normally not to exceed 30 days, to provide additional information or comments.

(4) The district engineer will follow Appendix B of 33 CFR Part 230 for environmental procedures and documentation required by the National Environmental Policy Act of 1969. A decision on a permit application will require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion.

(5) The district engineer will also evaluate the application to determine the need for a public hearing pursuant to 33 CFR Part 327.

(6) After all above actions have been completed, the district engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. He shall prepare a statement of findings (SOF) or, where an EIS has been prepared, a record of decision (ROD), on all permit decisions. The SOF or ROD shall include the district engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material into waters of the United States (40 CFR Part 230) or with the criteria for dumping of dredged material in ocean waters (40 CFR Parts 220 to 229), if applicable, and the conclusions of the district engineer. The SOF or ROD shall be dated, signed, and included in the record prior to final action on the application. Where the district engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the SOF or ROD. If a district engineer makes a decision on a permit application which is contrary to state or local decisions (33 CFR 320.4(j)(2) & (4)), the district engineer will include in the decision document the significant national issues and explain how they are overriding in importance. If a permit is warranted, the district engineer will determine the special conditions, if any, and duration which should be incorporated into the permit. In accordance with the authorities specified in Section 325.8 of this Part, the district engineer will take final action or forward the application with all pertinent comments, records. and studies, including the final EIS or environmental assessment, through channels to the official authorized to make the final decision. The report forwarding the application for decision will be in a format prescribed by the Chief of Engineers. District and division engineers will notify the applicant and interested federal and state agencies that the application has been forwarded to higher headquarters. The district or division engineer may, at his option, disclose his recommendation to the news media and other interested parties, with the caution that it is only a recommendation and not a final decision. Such disclosure is encouraged in permit cases which have become controversial and have been the subject of stories in the media or have generated strong public interest. In those cases where the application is forwarded for decision in the format prescribed by the Chief of Engineers, the report will serve as the SOF or ROD. District engineers will generally combine the SOF, environmental assessment, and findings of no significant impact (FONSI), 404(b)(1) guideline analysis, and/or the criteria for dumping of dredged material in ocean waters into a single document.

(7) If the final decision is to deny the permit, the applicant will be advised in writing of the reason(s) for denial. If the final decision is to issue the permit and a standard individual permit form will be used, the issuing official will forward the permit to the applicant for signature accepting the conditions of the permit. The permit is not valid until signed by the issuing official. Letters of permission require only the signature of the issuing official. Final action on the permit application is the signature on the letter notifying the applicant of the denial of the permit or signature of the issuing official on the authorizing document.

(8) The district engineer will publish monthly a list of permits issued or denied during the previous month. The list will identify each action by public notice number, name of applicant, and brief description of activity involved. It will also note that relevant environmental documents and the SOFs or RODs are available upon written request and, where applicable, upon the payment of administrative fees, This list will be distributed to all persons who may have an interest in any of the public notices listed.

(9) Copies of permits will be furnished to other agencies in appropriate cases as follows:

(i) If the activity involves the construction of artificial islands, installations or other devices on the outer continental shelf, to the Director, Defense Mapping Agency, Hydrographic Center, Washington, DC 20390 Attention, Code NS12, and to the Charting and Geodetic Services, N/ CG2?2, National Ocean Service NOAA. Rockville, Maryland 20852.

(ii) If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to the Defense Mapping Agency, Hydrographic Center and National Ocean Service as in paragraph (a)(9)(i) of this section and to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service. Washington, DC 20235.

(iii) If the activity involves the erection of an aerial transmission line, submerged cable, or submerged pipeline

across a navigable water of the United States, to the Charting and Geodetic Services N/CG222, National Ocean Service NOAA, Rockville, Maryland 20852.

(iv) If the activity is listed in paragraphs (a)(9) (i), (ii), or (iii) of this section, or involves the transportation of dredged material for the purpose of dumping it in ocean waters, to the appropriate District Commander, U.S. Coast Guard.

(b) *Procedures for particular types of permit situations.—(1) Section 407 Water Quality Certification.* If the district engineer determines that water quality certification for the proposed activity is necessary under the provisions of section 401 of the Clean Water Act, he shall so notify the applicant and obtain from him or the certifying agency a copy of such certification.

(i) The public notice for such activity, which will contain a statement on certification requirements (see § 325.3(a)(8)), will serve as the notification to the Administrator of the Environmental Protection Agency (EPA) pursuant to section 401(a)(2) of the Clean Water Act. If EPA determines that the proposed discharge may affect the quality of the waters of any state other than the state in which the discharge will originate, it will so notify such other state, the district engineer, and the applicant. If such notice or a request for supplemental information is not received within 30 days of issuance of the public notice, the district engineer will assume EPA has made a negative determination with respect to section 401(a)(2). If EPA determines another state's waters may be affected, such state has 60 days from receipt of EPA's notice to determine if the proposed discharge will affect the quality of its waters so as to violate any water quality requirement in such state, to notify EPA and the district engineer in writing of its objection to permit issuance, and to request a public hearing. If such occurs, the district engineer will hold a public hearing in the objecting state. Except as stated below, the hearing will be conducted in accordance with 33 CFR Part 327. The issues to be considered at the public hearing will be limited to water quality impacts. EPA will submit its evaluation and recommendations at the hearing with respect to the state's objection to permit issuance. Based upon the recommendations of the objecting state, EPA, and any additional evidence presented at the hearing, the district engineer will condition the permit, if issued, in such a manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot, in the district engineer's opinion, insure such compliance, he will deny the permit.

(ii) No permit will be granted until required certification has been obtained or has been waived. A waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act. In determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification. If, however, special circumstances identified by the district engineer require that action on an application be taken within a more limited period of time, the district engineer shall determine a reasonable lesser period of time, advise the certifying agency of the need for action by a particular date, and that, if certification is not received by that date, it will be considered that the requirement for certification has been waived. Similarly, if it appears that circumstances may reasonably require a period of time longer than sixty days, the district engineer, based on information provided by the certifying agency, will determine a longer reasonable period of time, not to exceed one year, at which time a waiver will be deemed to occur.

(2) *Coastal Zone Management Consistency.* If the proposed activity is to be undertaken in a state operating under a coastal zone management program approved by the Secretary of Commerce pursuant to the Coastal Zone Management (CZM) Act (see 33 CFR 320.3(b)), the district engineer shall proceed as follows:

(i) If the applicant is a federal agency, and the application involves a federal activity in or affecting the coastal zone, the district engineer shall forward a copy of the public notice to the agency of the state responsible for reviewing the consistency of federal activities. The federal agency applicant shall be responsible for complying with the CZM Act's directive for ensuring that federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved CZM Programs. (See 15 CFR Part 930.) If the state coastal zone agency objects to the proposed federal activity on the basis of its inconsistency with the state's approved CZM Program, the district engineer shall not make a final decision on the application until the disagreeing parties have had an opportunity to utilize the procedures specified by the CZM Act for resolving such disagreements.

(ii) If the applicant is not a federal agency and the application involves an activity affecting the coastal zone, the district engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the approved state CZM Program. Upon receipt of the certification, the district engineer will forward a copy of the public notice (which will include the applicant's certification statement) to the state coastal zone agency and request its concurrence or objection. If the state agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the district engineer shall not issue the permit until the state concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the CZM Act or is necessary in the interest of national security. If the state agency fails to concur or object to a certification statement within six months of the state agency's receipt of the certification statement, state agency concurrence with the certification statement shall be conclusively presumed. District engineers will seek agreements with state CZM agencies that the agency's failure to provide comments during the public notice comment period will be considered as a concurrence with the certification or waiver of the right to concur or non-concur.

(iii) If the applicant is requesting a permit for work on Indian reservation lands which are in the coastal zone, the district engineer shall treat the application in the same manner as prescribed for a Federal applicant in paragraph (b)(2)(i) of this section. However, if the applicant is requesting a permit on non-trust Indian lands, and the state CZM agency has decided to assert jurisdiction over such lands, the district engineer shall treat the application in the same manner as prescribed for a non-Federal applicant in paragraph (b)(2)(ii) of this section.

(3) *Historic Properties.* If the proposed activity would involve any property listed or eligible for listing in the National Register of Historic Places, the district engineer will proceed in accordance with Corps National Historic Preservation Act implementing regulations.

(4) *Activities Associated with Federal Projects.* If the proposed activity would consist of the dredging of an access channel and/or berthing facility associated with an authorized federal navigation project, the activity will be included in the planning and coordination of the construction or maintenance of the federal project to the maximum extent feasible. Separate notice, hearing, and environmental documentation will not be required for activities so included and coordinated, and the public notice issued by the district engineer for these federal and associated non-federal activities will be the notice of intent to issue permits for those included non-federal dredging activities, The decision whether to issue or deny such a permit will be consistent with the decision on the federal project unless special considerations applicable to the proposed activity are identified. (See § 322.5(c).)

(5) *Endangered Species.* Applications will be reviewed for the potential impact on threatened or endangered species pursuant to section 7 of the Endangered Species Act as amended. The district engineer will include a statement in the public notice of his current knowledge of endangered species based on his initial review of the application (see 33 CFR 325.2(a)(2)). If the district engineer determines that the proposed activity would not affect listed species or their critical habitat, he will include a statement to this effect in the public notice. If he finds the proposed activity may affect an endangered or threatened species or their critical habitat, he will initiate formal consultation procedures with the U.S. Fish and Wildlife Service or National Marine Fisheries Service. Public notices forwarded to the U.S. Fish and Wildlife Service or National Marine Fisheries Service will serve as the request for information on whether any listed or proposed to be listed endangered or threatened species may be present in the area which would be affected by the proposed activity. pursuant to section 7(c) of the Act. References, definitions, and consultation procedures are found in 50 CFR Part 402.

(c) (Reserved)

(d) *Timing of processing of applications.* The district engineer will be guided by the following time limits for the indicated steps in the evaluation process:

(1) The public notice will be issued within 15 days of receipt of all information required to be submitted by the applicant in accordance with paragraph 325.1.(d) of this Part.

(2) The comment period on the public notice should be for a reasonable period of time within which interested parties may express their views concerning the permit. The comment period should not be more than 30 days nor less than 15 days from the date of the notice. Before designating comment periods less than 30 days, the district engineer will consider: (1) Whether the proposal is routine or noncontroversial, (ii) mail time and need for comments from remote areas, (iii) comments from similar proposals, and (iv) the need for a site visit. After considering the length of the original comment period, paragraphs (a)(2) (i) through (iv) of this section, and other pertinent factors, the district engineer may extend the comment period up to an additional 30 days if warranted.

(3) District engineers will decide on all applications not later than 60 days after receipt of a complete application, unless (i) precluded as a matter of law or procedures required by law (see below). (ii) the case must be referred to higher authority (see § 325.8 of this Part), (iii) the comment period is extended, (iv) a timely submittal of information or comments is not received from the applicant, (v) the processing is suspended at the request of the applicant, or (vi) information needed by the district engineer for a decision on the application cannot reasonably be obtained within the 60-day period. Once the cause for preventing the decision from being made within the normal 60-day period has been satisfied or eliminated, the 60-day clock will start running again from where it was suspended. For example, if the comment period is extended by 30 days, the district engineer will, absent other restraints, decide on the application within 90 days of receipt of a complete application. Certain laws (e.g., the Clean Water Act, the CZM Act, the National Environmental Policy Act, the National Historic Preservation Act, the Preservation of Historical and Archeological Data Act, the Endangered Species Act, the Wild and Scenic Rivers Act, and the Marine Protection, Research and Sanctuaries Act) require procedures such as state or other federal agency certifications, public hearings, environmental impact statements, consultation, special studies, and testing which may prevent district engineers from being able to decide certain applications within 60 days.

(4) Once the district engineer has sufficient information to make his public interest determination, he should decide the permit application even though other agencies which may have regulatory jurisdiction have not yet granted their authorizations, except where such authorizations are, by federal law, a prerequisite to making a decision on the DA permit application. Permits granted prior to other (non-prerequisite) authorizations by other agencies should, where appropriate, be conditioned in such manner as to give those other authorities an opportunity to undertake their review without the applicant biasing such review by making substantial resource commitments on the basis of the DA permit. In unusual cases the district engineer may decide that due to the nature or scope of a specific proposal, it would be prudent to defer taking final action until another agency has acted on its authorization. In such cases, he may advise the other agency of his position on the DA permit while deferring his final decision.

(5) The applicant will be given a reasonable time, not to exceed 30 days. to respond to requests of the district engineer. The district engineer may make such requests by certified letter and clearly inform the applicant that if he does not respond with the requested information or a justification why additional time is necessary, then his application will be considered withdrawn or a final decision will be made, whichever is appropriate. If additional time is requested, the district engineer will either grant the time, make a final decision, or consider the application as withdrawn,

(6) The time requirements in these regulations are in terms of calendar days rather than in terms of working days.

(e) *Alternative procedures.* Division and district engineers are authorized to use alternative procedures as follows:

(1) *Letters of permission.* Letters of permission are a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act, and a public interest evaluation, but without the publishing of an individual public notice. The letter of permission will not be used to authorize the transportation of dredged material for the purpose of dumping it in ocean waters. Letters of permission may be used:

(i) In those cases subject to section 10 of the Rivers and Harbors Act of 1899 when, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition.

(ii) In those cases subject to section 404 of the Clean Water Act after:

(A) The district engineer, through consultation with Federal and state fish and wildlife agencies, the Regional

Administrator, Environmental Protection Agency, the state water quality certifying agency, and, if appropriate, the state Coastal Zone Management Agency, develops a list of categories of activities proposed for authorization under LOP procedures;

(B) The district engineer issues a public notice advertising the proposed list and the LOP procedures, requesting comments and offering an opportunity for public hearing; and

(C) A 401 certification has been issued or waived and, if appropriate, CZM consistency concurrence obtained or presumed either on a generic or individual basis.

(2) *Regional permits.* Regional permits are a type of general permit as defined in 33 CFR 322.2(f) and 33 CFR 323.2(n). They may be issued by a division or district engineer after compliance with the other procedures of this regulation. After a regional permit has been issued, individual activities falling within those categories that are authorized by such regional permits do not have to be further authorized by the procedures of this regulation. The issuing authority will determine and add appropriate conditions to protect the public interest. When the issuing authority determines on a case-by-case basis that the concerns for the aquatic environment so indicate, he may exercise discretionary authority to override the regional permit and require an individual application and review. A regional permit may be revoked by the issuing authority if it is determined that it is contrary to the public interest provided the procedures of § 325.7 of this Part are followed. Following revocation, applications for future activities in areas covered by the regional permit shall be processed as applications for individual permits. No regional permit shall be issued for a period of more than five years.

(3) *Joint procedures.* Division and district engineers are authorized and encouraged to develop joint procedures with states and other Federal agencies with ongoing permit programs for activities also regulated by the Department of the Army. Such procedures may be substituted for the procedures in paragraphs (a)(1) through (a)(5) of this section provided that the substantive requirements of those sections are maintained. Division and district engineers are also encouraged to develop management techniques such as joint agency review meetings to expedite the decision-making process. However, in doing so, the applicant's rights to a full public interest review and independent decision by the district or division engineer must be strictly observed.

(4) *Emergency procedures.* Division engineers are authorized to approve special processing procedures in emergency situations. An "emergency" is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. In emergency situations, the district engineer will explain the circumstances and recommend special procedures to the division engineer who will instruct the district engineer as to further processing of the application. Even in an emergency situation, reasonable efforts will be made to receive comments from interested Federal, state, and local agencies and the affected public. Also, notice of any special procedures authorized and their rationale is to be appropriately published as soon as practicable.

§ 325.3 Public notice.

(a) *General.* The public notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest. The notice must, therefore, include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment. The notice should include the following items of information:

(1) Applicable statutory authority or authorities;

(2) The name and address of the applicant;

(3) The name or title, address and telephone number of the Corps employee from whom additional information concerning the application may be obtained;

(4) The location of the proposed activity;

(5) A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills or pile or float-supported platforms, and a description of the type, composition, and quantity of materials to be discharged or disposed of in the ocean;

(6) A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waterway and depth of water in the area;

(7) If the proposed activity would occur in the territorial seas or ocean waters, a description of the activity's relationship to the baseline from which the territorial sea is measured;

(8) A list of other government authorizations obtained or requested by the applicant, including required certifications relative to water quality, coastal zone management, or marine sanctuaries;

(9) If appropriate, a statement that the activity is a categorical exclusion for purposes of NEPA (see paragraph 7 of Appendix B to 33 CFR Part 230);

(10) A statement of the district engineer's current knowledge on historic properties;

(11) A statement of the district engineer's current knowledge on endangered species (see § 325.2(b)(5));

(12) A statement(s) on evaluation factors (see § 325.3(c));

(13) Any other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest;

(14) The comment period based on § 325.2(d)(2);

(15) A statement that any person may request, in writing, within the comment period specified in the notice, that a public hearing be held to consider the application. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing;

(16) For non-federal applications in states with an approved CZM Plan, a statement on compliance with the approved Plan; and

(17) In addition, for section 103 (ocean dumping) activities:

(i) The specific location of the proposed disposal site and its physical boundaries;

(ii) A statement as to whether the proposed disposal site has been designated for use by the Administrator, EPA, pursuant to section 102(c) of the Act;

(iii) If the proposed disposal site has not been designated by the Administrator, EPA, a description of the characteristics of the proposed disposal site and an explanation as to why no previously designated disposal site is feasible;

(iv) A brief description of known dredged material discharges at the proposed disposal site;

(v) Existence and documented effects of other authorized disposals that have been made in the disposal area (e.g.,

heavy metal background reading and organic carbon content);

(vi) An estimate of the length of time during which disposal would continue at the proposed site; and

(vii) Information on the characteristics and composition of the dredged material.

(b) *Public notice for general permits.* District engineers will publish a public notice for all proposed regional general permits and for significant modifications to, or reissuance of, existing regional permits within their area of jurisdiction. Public notices for statewide regional permits may be issued jointly by the affected Corps districts. 'The notice will include all applicable information necessary to provide a clear understanding of the proposal. In addition, the notice will state the availability of information at the district office which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance of general permits. District engineers will publish a public notice for nationwide permits in accordance with 33 CFR 330.4.

(c) *Evaluation factors.* A paragraph describing the various evaluation factors on which decisions are based shall be included in every public notice.

(1) Except as provided in paragraph (c)(3) of this section, the following will be included:

"The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people."

(2) If the activity would involve the discharge of dredged or fill material into the waters of the United States or the transportation of dredged material for the purpose of disposing of it in ocean waters, the public notice shall also indicate that the evaluation of the impact of the activity on the public interest will include application of the guidelines promulgated by the Administrator, EPA, (40 CFR Part 230) or of the criteria established under authority of section 102(a) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (40 CFR Parts 220 to 229), as appropriate. (See 33 CFR Parts 323 and 324).

(3) In cases involving construction of artificial islands, installations and other devices on outer continental shelf lands which are under mineral lease from the Department of the Interior, the notice will contain the following statement: "The decision as to whether a permit will be issued will be based on an evaluation of the impact of the proposed work on navigation and national security."

(d) *Distribution of public notices.* (1) Public notices will be distributed for posting in post offices or other appropriate public places in the vicinity of the site of the proposed work and will be sent to the applicant, to appropriate city and county officials, to adjoining property owners, to appropriate state agencies, to appropriate Indian Tribes or tribal representatives, to concerned Federal agencies, to local, regional and national shipping and other concerned business and conservation organizations, to appropriate River Basin Commissions, to appropriate state and areawide clearing houses as prescribed by OMB Circular A—95, to local news media and to any other interested party. Copies of public notices will be sent to all parties who have specifically requested copies of public notices, to the U.S. Senators and Representatives for the area where the work is to be performed, the field representative of the Secretary of the Interior, the Regional Director of the Fish and Wildlife Service, the Regional Director of the National Park Service, the Regional Administrator of the Environmental Protection Agency (EPA), the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA), the head of the state agency responsible for fish and wildlife resources, the State Historic Preservation Officer, and the District Commander, U.S. Coast Guard.

(2) In addition to the general distribution of public notices cited above, notices will be sent to other addressees in appropriate cases as follows:

(i) If the activity would involve structures or dredging along the shores of the seas or Great Lakes, to the Coastal Engineering Research Center, Washington, DC 20010.

(ii) If the activity would involve construction of fixed structures or artificial islands on the outer continental shelf or in the territorial seas, to the Assistant Secretary of Defense (Manpower, Installations, and Logistics (ASD(MI&L)), Washington, DC 20310; the Director, Defense Mapping Agency (Hydrographic Center) Washington, DC 20390, Attention, Code NS12; and the Charting and Geodetic Services, N/ CG222, National Ocean Service NOAA, Rockville, Maryland 20852, and to affected military installations and activities.

(iii) If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, DC 20235.

(iv) If the activity involves the construction of structures which may affect aircraft operations or for purposes associated with seaplane operations, to the Regional Director of the Federal Aviation Administration.

(v) If the activity would be in connection with a foreign-trade zone, to the Executive Secretary, Foreign-Trade Zones Board, Department of Commerce, Washington, DC 20230 and to the appropriate District Director of Customs as Resident Representative, Foreign Trade Zones Board.

(3) It is presumed that all interested parties and agencies will wish to respond to public notices; therefore, a lack of response will be interpreted as meaning that there is no objection to the proposed project. A copy of the public notice with the list of the addresses to whom the notice was sent will be included in the record. If a question develops with respect to an activity for which another agency has responsibility and that other agency has not responded to the public notice, the district engineer may request its comments. Whenever a response to a public notice has been received from a member of Congress, either in behalf of a constituent or himself, the district engineer will inform the member of Congress of the final decision.

(4) District engineers will update public notice mailing lists at least once every two years.

§ 325.4. Conditioning of permits.

(a) District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.

(1) Legal requirements which may be satisfied by means of Corps permit conditions include compliance with the 404(b)(1) guidelines, the EPA ocean dumping criteria, the Endangered Species Act, and requirements imposed by conditions on state section 401 water quality certifications.

(2) Where appropriate, the district engineer may take into account the existence of controls imposed under other federal, state, or local programs which would achieve the objective of the desired condition, or the existence of an enforceable agreement between the applicant and another party concerned with the resource in question, in determining whether a proposal complies with the 404(b)(1) guidelines. ocean dumping criteria, and other applicable statutes, and is not contrary to the public interest. In such cases, the Department of the Army permit will be conditioned to state that material changes in, or a failure to implement and enforce such program or agreement, will be grounds for modifying, suspending, or revoking the permit.

(3) Such conditions may be accomplished on-site, or may be accomplished off-site for mitigation of significant losses which are specifically identifiable, reasonably likely to occur. and of importance to the human or aquatic environment.

(b) District engineers are authorized to add special conditions, exclusive of paragraph (a) of this section, at the applicant's request or to clarify the permit application.

(c) If the district engineer determines that special conditions are necessary to insure the proposal will not be contrary to the public interest, but those conditions would not be reasonably implementable or enforceable, he will deny the permit.

(d) *Bonds,* lithe district engineer has reason to consider that the permittee might be prevented from completing work which is necessary to protect the public interest, he may require the permittee to post a bond of sufficient amount to indemnify the government against any loss as a result of corrective action it might take.

§ 325.5 Forms of permits.

(a) *General discussion.* (1) DA permits under this regulation will be in the form of individual permits or general permits. The basic format shall be ENG Form 1721, DA Permit (Appendix A).

(2) The general conditions included in ENG Form 1721 are normally applicable to all permits; however, some conditions may not apply to certain permits and may be deleted by the issuing officer. Special conditions applicable to the specific activity will be included in the permit as necessary to protect the public interest in accordance with Section 325.4 of this Part.

(b) *Individual permits—(1) Standard permits.* A standard permit is one which has been processed through the public interest review procedures, including public notice and receipt of comments, described throughout this Part. The standard individual permit shall be issued using ENG Form 1721.

(2) *Letters of permission.* A letter of permission will be issued where procedures of paragraph 325.2(e)(1) have been followed. It will be in letter form and will identify the permittee, the authorized work and location of the work, the statutory authority, any limitations on the work, a construction time limit and a requirement for a report of completed work. A copy of the relevant general conditions from ENG Form 1721 will be attached and will be incorporated by reference into the letter of permission.

(c) *General permits—(i) Regional permits.* Regional permits are a type of general permit. They may be issued by a division or district engineer after compliance with the other procedures of this regulation. if the public interest so requires, the issuing authority may condition the regional permit to require a case-by-case reporting and acknowledgment system. However, no separate applications or other authorization documents will be required.

(2) *Nationwide permits.* Nationwide permits are a type of general permit and represent DA authorizations that have been issued by the regulation (33 CFR Part 330) for certain specified activities nationwide. If certain conditions are met, the specified activities can take place without the need for an individual or regional permit.

(3) *Programmatic permits.* Programmatic permits are a type of general permit founded on an existing state, local or other Federal agency program and designed to avoid duplication with that program.

(d) *Section 9 permits.* Permits for structures in interstate navigable waters of the United States under section 9 of the Rivers and Harbors Act of 1899 will be drafted at DA level.

§ 325.6 Duration of permits.

(a) *General.* DA permits may authorize both the work and the resulting use. Permits continue in effect until they automatically expire or are modified, suspended, or revoked.

(b) *Structures.* Permits for the existence of a structure or other activity of a permanent nature are usually for an indefinite duration with no expiration date cited. However, where a temporary structure is authorized, or where restoration of a waterway is contemplated, the permit will be of limited duration with a definite expiration date.

(c) *Works.* Permits for construction work, discharge of dredged or fill material, or other activity and any construction period for a structure with a permit of indefinite duration under paragraph (b) of this section will specify time limits for completing the work or activity. The permit may also specify a date by which the work must be started, normally within one year from the date of issuance. The date will be established by the issuing official and will provide reasonable times based on the scope and nature of the work involved. Permits issued for the transport of dredged material for the purpose of disposing of it in ocean waters will specify a completion date for the disposal not to exceed three years from the date of permit issuance.

(d) *Extensions of time.* An authorization or construction period will automatically expire if the permittee fails to request and receive an extension of time. Extensions of time may be granted by the district engineer. The permittee must request the extension and explain the ba8is of the request, which will be granted unless the district engineer determines that an extension would be contrary to the public interest. Requests for extensions will be processed in accordance with the regular procedures of § 325.2 of this Part, including issuance of a public notice, except that such processing is not required where the district engineer determines that there have been no significant changes in the attendant circumstances since the authorization was issued.

(e) *Maintenance dredging.* lithe authorized work includes periodic maintenance dredging, an expiration date for the authorization of that maintenance dredging will be included in the permit. The expiration date, which in no event is to exceed ten years from the date of issuance of the permit, will be established by the issuing official after evaluation of the proposed method of dredging and disposal of the dredged material in accordance with the requirements of 33 CFR Parts 320 to 325. In such cases, the district engineer shall require notification of the maintenance dredging prior to actual performance to insure continued compliance with the requirements of this regulation and 33 CFR Parts 320 to 324. If the permittee desires to continue maintenance

dredging beyond the expiration date, he must request a new permit. The permittee should be advised to apply for the new permit six months prior to the time he wishes to do the maintenance work.

§ 325.7 Modification, suspension, or revocation of permits.

(a) *General.* The district engineer may reevaluate the circumstances and conditions of any permit, including regional permits, either on his own motion, at the request of the permittee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest. in the case of regional permits, this reevaluation may cover individual activities, categories of activities, or geographic areas. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended. and the continuing adequacy of or need for the permit conditions; any significant objections to the authorized activity which were not earlier considered: revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with § 325.2 of this Part, and not as modifications under this section.

(b) *Modification.* Upon request by the permittee or, as a result of reevaluation of the circumstances and conditions of a permit, the district engineer may determine that the public interest requires a modification of the terms or conditions of the permit. In such cases, the district engineer will hold informal consultations with the permittee to ascertain whether the terms and conditions can be modified by mutual agreement. If a mutual agreement is reached on modification of the terms and conditions of the permit, the district engineer will give the permittee written notice of the modification, which will then become effective on such date as the district engineer may establish, In the event a mutual agreement cannot be reached by the district engineer and the permittee, the district engineer will proceed in accordance with paragraph (c) of this section if immediate suspension is warranted. In cases where immediate suspension is not warranted but the district engineer determines that the permit should be modified, he will notify the permittee of the proposed modification and reasons therefor, and that he may request a meeting with the district engineer and/or a public hearing. The modification will become effective on the date set by the district engineer which shall be at least ten days after receipt of the notice by the permittee unless a hearing or meeting is requested within that period. If the permittee fails or refuses to comply with the modification, the district engineer will proceed in accordance with 33 CFR Part 326. The district engineer shall consult with resource agencies before modifying any permit terms or conditions, that would result in greater impacts, for a project about which that agency expressed a significant interest in the term, condition, or feature being modified prior to permit issuance.

(c) *Suspension.* The district engineer may suspend a permit after preparing a written determination and finding that immediate suspension would be in the public interest. The district engineer will notify the permittee in writing by the most expeditious means available that the permit has been suspended with the reasons therefor, and order the permittee to stop those activities previously authorized by the suspended permit. The permittee will also be advised that following this suspension a decision will be made to either reinstate, modify, or revoke the permit, and that he may within 10 days of receipt of notice of the suspension, request a meeting with the district engineer and/ or a public hearing to present information in this matter. If a hearing is requested, the procedures prescribed in 33 CFR Part 327 will be followed. After the completion of the meeting or hearing (or within a reasonable period of time after issuance of the notice to the permittee that the permit has been suspended if no hearing or meeting is requested), the district engineer will take action to reinstate, modify, or revoke the permit.

(d) *Revocation.* Following completion of the suspension procedures in paragraph (c) of this section, if revocation of the permit is found to be in the public interest, the authority who made the decision on the original permit may revoke it. The permittee will be advised in writing of the final decision.

(e) *Regional permits.* The issuing official may, by following the procedures of this section, revoke regional permits for individual activities, categories of activities, or geographic areas. Where groups of permittees are involved, such as for categories of activities or geographic areas, the informal discussions provided in paragraph (b) of this section may be waived and any written notification nay be made through the general public notice procedures of this regulation. If a regional permit is revoked, any permittee may then apply for an individual permit which shall be processed in accordance with these regulations.

§ 325.8 Authority to issue or deny permits

(a) *General.* Except as otherwise provided in this regulation, the Secretary of the Army, subject to such conditions as he or his authorized representative may from time to time impose, has authorized the Chief of Engineers and his authorized representatives to issue or deny permits for dams or dikes in intrastate waters of the United States pursuant to section 9 of the Rivers and Harbors Act of 1899; for construction or other work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899; for the discharge of dredged or fill material into waters of the United States pursuant to section 404 of the Clean Water Act; or for the transportation of dredged material for the purpose of disposing of it into ocean waters pursuant to section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended. The authority to issue or deny permits in interstate navigable waters of the United States pursuant to section 9 of the Rivers and Harbors Act of March 3, 1899 has not been delegated to the Chief of Engineers or his authorized representatives.

(b) *District engineer's authority.* District engineers are authorized to issue or deny permits in accordance with these regulations pursuant to sections 9 and 10 of the Rivers and Harbors Act of 1899; section 404 of the Clean Water Act; and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, in all cases not required to be referred to higher authority (see below). It is essential to the legality of a permit that it contain the name of the district engineer as the issuing officer. However, the permit need not be signed by the district engineer in person but may be signed for and in behalf of him by whomever he designates, In cases where permits are denied for reasons other than navigation or failure to obtain required local, state, or other federal approvals or certifications, the Statement of Findings must conclusively justify a denial decision. District

engineers are authorized to deny permits without issuing a public notice or taking other procedural steps where required local, state, or other federal permits for the proposed activity have been denied or where he determines that the activity will clearly interfere with navigation except in all cases required to be referred to higher authority (see below). District engineers are also authorized to add, modify, or delete special conditions in permits in accordance with § 325.4 of this Part, except for those conditions which may have been imposed by higher authority, and to modify, suspend and revoke permits according to the procedures of § 325.7 of this Part. District engineers will refer the following applications to the division engineer for resolution:

(1) When a referral is required by a written agreement between the head of a Federal agency and the Secretary of the Army;

(2) When the recommended decision is contrary to the written position of the Governor of the state in which the work would be performed;

(3) When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;

(4) When higher authority requests the application be forwarded for decision; or

(5) When the district engineer is precluded by law or procedures required by law from taking final action on the application (e.g. section 9 of the Rivers and Harbors Act of 1899, or territorial sea baseline changes).

(c) *Division engineer's authority.* Division engineers will review and evaluate all permit applications referred by district engineers. Division engineers may authorize the issuance or denial of permits pursuant to section 10 of the Rivers and Harbors Act of 1899; section 404 of the Clean Water Act; and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended; and the inclusion of conditions in accordance with § 325.4 of this Part in all cases not required to be referred to the Chief of Engineers.

Division engineers will refer the following applications to the Chief of Engineers for resolution:

(1) When a referral is required by a written agreement between the head of a Federal agency and the Secretary of the Army;

(2) When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;

(3) When higher authority requests the application be forwarded for decision: or

(4) When the division engineer is precluded by law or procedures required by law from taking final action on the application.

§ 325.9 Authority to determine jurisdiction.

District engineers are authorized to determine the area defined by the terms "navigable waters of the United States" and "waters of the United States" except:

(a) When a determination of navigability is made pursuant to 33 CFR 329.14 (division engineers have this authority); or

(b) When EPA makes a section 404 jurisdiction determination under its authority.

§ **325.10 Publicity.**

The district engineer will establish and maintain a program to assure that potential applicants for permits are informed of the requirements of this regulation and of the steps required to obtain permits for activities in waters of the United States or ocean waters. Whenever the district engineer becomes aware of plans being developed by either private or public entities which might require permits for implementation, he should advise the potential applicant in writing of the statutory requirements and the provisions of this regulation. Whenever the district engineer is aware of changes in Corps of Engineers regulatory jurisdiction, he will issue appropriate public notices.

Appendix A—Permit Form and Special Conditions

A. Permit Form

Department of the Army Permit

Permittee _____

Permit No. _____

Issuing Office _____

Note.—The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below.

Project Description: (Describe the permitted activity and its intended use with references to any attached plans or drawings that are considered to be a part of the project description. Include a description of the types and quantities of dredged or fill materials to be discharged in jurisdictional waters.)

Project Location: (Where appropriate, provide the names of and the locations on the waters where the permitted activity and any off-site disposals will take place. Also, using name, distance, and direction, locate the permitted activity in reference to a nearby landmark such as a town or city.)

Permit Conditions:

General Conditions:

1. The time limit for completing the work authorized ends on _____. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.

2. You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project. you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

Special Conditions: (Add special conditions as required in this space with reference to a continuation sheet if necessary.)

Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

( ) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

( ) Section 404 of the Clean Water Act (33 U.S.C. 1344).

( ) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1410).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, state, or local authorizations required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstance8 warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

_____

Permittee

_____

(Date)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

_____

(District Engineer

_____

(Date)

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

_____

(Transferee)

_____

(Date)

B. Special Conditions. No special conditions will be preprinted on the permit form. The following and other special conditions should be added, as appropriate, in the space provided after the general conditions or on a referenced continuation sheet:

1. Your use of the permitted activity must not interfere with the public's right to free navigation on all navigable waters of the United States.

2. You must have a copy of this permit available on the vessel used for the authorized transportation and disposal of dredged material.

3. You must advise this office in writing, at least two weeks before you start maintenance dredging activities under the authority of this permit.

4. You must install and maintain, at your expense, any safety lights and signals prescribed by the United States Coast Guard (USCG), through regulations or otherwise, on your authorized facilities. The USCG may be reached at the following address and telephone number:

_____

_____

5. The condition below will be used when a Corps permit authorizes an artificial reef, an aerial transmission line, a submerged cable or pipeline, or a structure on the outer continental shelf.

National Ocean Service (NOS) has been notified of this authorization. You must notify NOS and this office in writing, at least two weeks before you begin work and upon completion of the activity authorized by this permit. Your notification of completion must include a drawing which certifies the location and configuration of the completed activity (a certified permit drawing may be used). Notifications to NOS will be sent to the following address: The Director, National Ocean Service (N/CG 222), Rockville, Maryland 20852.

6. The following condition should be used for every permit where legal recordation of the permit would be reasonably practicable and recordation could put a subsequent purchaser or owner of property on notice of permit conditions.

You must take the actions required to record this permit with the Registrar of Deeds or other appropriate official charged with the responsibility for maintaining records of title to or interest in real property.

Appendix B—(Reserved) (For Future NEPA Regulation)

Appendix C---(Reserved) (For Historic Properties Regulation)

PART 326—ENFORCEMENT

Sec.
326.1 Purpose.
326.2 Policy.
326.3 Unauthorized activities.
328.4 Supervision of authorized activities.
326.5 Legal action.

Authority: 33 U.S.C. 401 et seq.: 33 U.S.C. 1344: 33 U.S.C. 1413.

§ 326.1 Purpose.

This Part prescribes enforcement policies **(§** 326.2) and procedures applicable to activities performed without required Department of the Army permits (§ 326.3) and to activities not in compliance with the terms and conditions of issued Department of the Army permits **(§** 326.4). Procedures for initiating legal actions are prescribed in § 326.5. Nothing contained in this Part shall establish a non-discretionary duty on the part of district engineers nor shall deviation from these procedures give rise to a private right of action against a district engineer.

§ 326.2 Policy.

Enforcement, as part of the overall regulatory program of the Corps, is based on a policy of regulating the waters of the United States by discouraging activities that have not been properly authorized and by requiring corrective measures, where appropriate, to ensure those waters are not misused and to maintain the integrity of the program. There are several methods discussed in the remainder of this part which can be used either singly or in combination to implement this policy, while making the most effective use of the enforcement resources available. As EPA has independent enforcement authority under the Clean Water Act for unauthorized discharges, the district engineer should normally coordinate with EPA to determine the most effective and efficient manner by which resolution of a section 404 violation can be achieved.

§ 326.3 Unauthorized activities.

(a) *Surveillance.* To detect unauthorized activities requiring permits, district engineers should make the best use of all available resources.

Corps employees; members of the public; and representatives of state. local, and other Federal agencies should be encouraged to report suspected violations. Additionally, district engineers should consider developing joint surveillance procedures with Federal, state, or local agencies having similar regulatory responsibilities, special expertise, or interest.

(b) *Initial investigation.* District engineers should take steps to investigate suspected violations in a timely manner. The scheduling of investigations will reflect the nature and location of the suspected violations, the anticipated impacts, and the most effective use of inspection resources available to the district engineer. These investigations should confirm whether a violation exists, and if so, will identify the extent of the violation and the parties responsible.

(c) *Formal notifications to parties responsible for violations.* Once the district engineer has determined that a violation exists, he should take appropriate steps to notify the responsible parties.

(1) If the violation involves a project that is not complete, the district engineer's notification should be in the form of a cease and desist order prohibiting any further work pending resolution of the violation in accordance with the procedures contained in this part. See paragraph (c)(4) of this section for exception to this procedure.

(2) If the violation involves a completed project, a cease and desist order should not be necessary. However, the district engineer should still notify the responsible parties of the violation.

(3) All notifications, pursuant to paragraphs (c) (1) and (2) of this section, should identify the relevant statutory authorities, indicate potential enforcement consequences and direct the responsible parties to submit any additional information that the district engineer may need at that time to determine what course of action he should pursue in resolving the violation; further information may be requested, as needed, in the future.

(4) In situations which would, if a violation were not involved, qualify for emergency procedures pursuant to 33 CFR Part 325.2(e)(4), the district engineer may decide it would not be appropriate to direct that the unauthorized work be stopped. Therefore, in such situations, the district engineer may, at his discretion, allow the work to continue, subject to appropriate limitations and conditions as he may prescribe, while the violation is being resolved in accordance with the procedures contained in this part.

(5) When an unauthorized activity requiring a permit has been undertaken by American Indians (including Alaskan natives, Eskimos, and Aleuts. but not including Native Hawaiians) on reservation lands or in pursuit of specific treaty rights, the district engineer should use appropriate means to coordinate proposed directives and orders with the Assistant Chief Counsel for Indian Affairs (DAEN—CCI).

(6) When an unauthorized activity requiring a permit has been undertaken by an official acting on behalf of a foreign government, the district engineer should use appropriate means to coordinate proposed directives and orders with the Office, Chief of Engineers, ATTN: DAEN-CCK.

(d) *Initial corrective measures.* (1) The district engineer should, in appropriate cases, depending upon the nature of the impacts associated with the unauthorized, completed work, solicit the views of the Environmental Protection Agency; the U.S. Fish and Wildlife Service; the National Marine Fisheries Service, and other Federal, state, and local agencies to facilitate his decision on what initial corrective measures are required. If the district engineer determines as a result of his investigation, coordination, and preliminary evaluation that initial corrective measures are required, he should issue an appropriate order to the parties responsible for the violation. In determining what initial corrective measures are required, the district engineer should consider whether serious jeopardy to life, property, or important public resources (see 33 CFR Part 320.4) may be reasonably anticipated to occur during the period required for the ultimate resolution of the violation. In his order, the district engineer will specify the initial corrective measures required and the time limits for completing this work. In unusual cases where initial corrective measures substantially eliminate all current and future detrimental impacts resulting from the unauthorized work, further enforcement actions should normally be unnecessary. For all other cases, the district engineer's order should normally specify that compliance with the order will not foreclose the Government's options to initiate appropriate legal action or to later require the submission of a permit application.

(2) An order requiring initial corrective measures that resolve the violation may also be issued by the district engineer in situations where the acceptance or processing of an after-the-fact permit application is prohibited or considered not appropriate pursuant to § 326.3(e)(1)(iii)—(iv) below. However, such orders will be issued only when the district engineer has reached an independent determination that such measures are necessary and appropriate.

(3) It will not be necessary to issue a Corps permit in connection with initial corrective measures undertaken at the direction of the district engineer.

(e) *After-the-fact permit applications.* (1) Following the completion of any required initial corrective measures, the district engineer will accept an after-the-fact permit application unless he determines that one of the exceptions listed in subparagraphs i—iv below is applicable. Applications for after-the-fact permits will be processed in accordance with the applicable procedures in 33 CFR Parts 320—325. Situations where no permit application will be processed or where the acceptance of a permit application must be deferred are as follows:

(i) No permit application will be processed when restoration of the waters of the United States has been completed that eliminates current and future detrimental impacts to the 8atisfaction of the district engineer.

(ii) No permit application will be accepted in connection with a violation where the district engineer determines that legal action is appropriate (* 326.5(a)) until such legal action has been completed.

(iii) No permit application will be accepted where a Federal, state, or local authorization or certification, required by Federal law, has already been denied.

(iv) No permit application will be accepted nor will the processing of an application be continued when the district engineer is aware of enforcement litigation that has been initiated by other Federal, state, or local regulatory agencies, unless he determines that concurrent processing of an after-the-fact permit application is clearly appropriate.

(2) Upon completion of his review in accordance with 33 CFR Parts 320—325, the district engineer will determine if a permit should be issued, with special conditions if appropriate, or denied. In reaching a decision to issue, be must determine that the work involved is not contrary to the public interest, and if section 404 is applicable, that the work also complies with the Environmental Protection Agency's section 404(b)(1) guidelines. if he determines that a denial is warranted, his notification of denial should prescribe any final corrective

actions required. His notification should also establish a reasonable period of time for the applicant to complete such actions unless he determines that further information is required before the corrective measures can be specified. If further information is required, the final corrective measures may be specified at a later date. If an applicant refuses to undertake prescribed corrective actions ordered subsequent to permit denial or refuses to accept a conditioned permit, the district engineer may initiate legal action in accordance with § 326.5.

(f) *Combining steps.* The procedural steps in this section are in the normal sequence. However, these regulations do not prohibit the streamlining of the enforcement process through the combining of steps.

(g) *Coordination with EPA.* In all cases where the district engineer is aware that EPA is considering enforcement action, he should coordinate with EPA to attempt to avoid conflict or duplication. Such coordination applies to interim protective measures and after-the-fact permitting, as well as to appropriate legal enforcement actions.

§ 326.4 Supervision of authorized activities.

(a) *Inspections.* District engineers will, at their discretion, take reasonable measures to inspect permitted activities, as required, to ensure that these activities comply with specified terms and conditions. To supplement inspections by their enforcement personnel, district engineers should encourage their other personnel; members of the public; and interested state, local, and other Federal agency representatives to report suspected violations of Corps permits. To facilitate inspections, district engineers will, in appropriate cases, require that copies of ENG Form 4336 be posted conspicuously at the sites of authorized activities and will make available to all interested persons information on the terms and conditions of issued permits. The U.S. Coast Guard will inspect permitted ocean dumping activities pursuant to section 107(c) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended.

(b) *Inspection limitations.* Section 326.4 does not establish a non-discretionary duty to inspect permitted activities for safety, sound engineering practices, or interference with other permitted or unpermitted structures or uses in the area. Further, the regulations implementing the Corps regulatory program do not establish a non-discretionary duty to inspect permitted activities for any other purpose.

(c) *Inspection expenses.* The expenses incurred in connection with the inspection of permitted activities will normally be paid by the Federal Government unless daily supervision or other unusual expenses are involved. In such unusual cases, the district engineer may condition permits to require permittees to pay inspection expenses pursuant to the authority contained in Section 9701 of Pub L. 97—258 (33 U.S.C. 9701). The collection and disposition of inspection expense funds obtained from applicants will be administered in accordance with the relevant Corps regulations governing such funds.

(d) *Non-compliance.* If a district engineer determines that a permittee has violated the terms or conditions of the permit and that the violation is sufficiently serious to require an enforcement action, then he should, unless at his discretion he deems it inappropriate: (1) First contact the permittee; (2) request corrected plans reflecting actual work, if needed; and (3) attempt to resolve the violation. Resolution of the violation may take the form of the permitted project being voluntarily brought into compliance or of a permit modification (33 CFR 325.7(b)). If a mutually agreeable solution cannot be reached, a written order requiring compliance should normally be issued and delivered by personal service. Issuance of an order is not, however, a prerequisite to legal action. If an order is issued, it will specify a time period of not more than 30 days for bringing the permitted project into compliance, and a copy will be sent to the appropriate state official pursuant to section 404(s)(2) of the Clean Water Act. If the permittee fails to comply with the order within the specified period of time, the district engineer may consider using the suspension/revocation procedures in 33 CFR 325.7(c) and/or he may recommend legal action in accordance with § 326.5.

§ 326.5 Legal action.

(a) *General.* For cases the district engineer determines to be appropriate, he will recommend criminal or civil actions to obtain penalties for violations, compliance with the orders and directives he has issued pursuant to § § 326.3 and 326.4, or other relief as appropriate. Appropriate cases for criminal or civil action include, but are not limited to, violations which, in the district engineer's opinion, are willful, repeated, flagrant, or of substantial impact.

(b) *Preparation of case.* If the district engineer determines that legal action is appropriate, he will prepare a litigation report or such other documentation that he and the local U.S. Attorney have mutually agreed to, which contains an analysis of the information obtained during his investigation of the violation or during the processing of a permit application and a recommendation of appropriate legal action. The litigation report or alternative documentation will also recommend what, if any, restoration or mitigative measures are required and will provide the rationale for any such recommendation.

(c) *Referral to the local U.S. Attorney.* Except as provided in paragraph (d) of this section, district engineers are authorized to refer cases directly to the U.S. Attorney. Because of the unique legal system in the Trust Territories, all cases over which the Department of Justice has no authority will be referred to the Attorney General for the trust Territories. Information copies of all letters of referral shall be forwarded to the appropriate division counsel, the Office, Chief of Engineers, ATTN: DAEN—CCK, the Office of the Assistant Secretary of the Army (Civil Works), and the Chief of the Environmental Defense Section, Lands and Natural Resources Division, U.S. Department of Justice.

(d) *Referral to the Office, Chief of Engineers.* District engineers will forward litigation reports with recommendations through division offices to the Office, Chief of Engineers, ATTN: DAEN—CCK, for all cases that qualify under the following criteria:

(1) Significant precedential or controversial questions of law or fact;

(2) Requests for elevation to the Washington level by the Department of Justice;

(3) Violations of section 9 of the Rivers and Harbors Act of 1899;

(4) Violations of section 103 the Marine Protection, Research and Sanctuaries Act of 1972;

(5) All cases involving violations by American Indians (original of litigation report to DAEN—CCI with copy to DAEN—CCK) on reservation lands or in pursuit of specific treaty rights;

(6) All cases involving violations by officials acting on behalf of foreign governments; and

(7) Cases requiring action pursuant to paragraph (e) of this section.

(e) *Legal option not available,* In cases where the local U.S. Attorney declines to take legal action, it would be appropriate for the district engineer to close the enforcement case record unless he believes that the case warrants special attention. In that situation, he is encouraged to forward a litigation report to the Office, Chief of Engineers, ATTN: DAEN—CCK. for

direct coordination through the Office of the Assistant Secretary of the Army (Civil Works) with the Department of Justice. Further, the case record should not be closed if the district engineer anticipates that further administrative enforcement actions, taken in accordance with the procedures prescribed in this part, will identify remedial measures which, if not complied with by the parties responsible for the violation, will result in appropriate legal action at a later date,

PART 327—PUBLIC HEARINGS

Sec.
327.1 Purpose.
327.2 Applicability.
327.3 Definitions.
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327.9 Filing of transcript of the public hearing.
327.10 Authority of the presiding officer.
327.11 Public notice.

Authority: 33 U.S.C. 1344: 33 U.S.C. 1413.

§ 327.1 Purpose.

This regulation prescribes the policy. practice and procedures to be followed by the U.S. Army Corps of Engineers in the conduct of public hearings conducted in the evaluation of a proposed DA permit action or Federal project as defined in § 327.3 of this Part including those held pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344) and section 103 of the Marine Protection, Research and Sanctuaries Act (MPRSA), as amended (33 U.S.C. 1413).

§ 327.2 Applicability.

This regulation is applicable to all divisions and districts responsible for the conduct of public hearings.

§ 327.3 Definitions.

(a) Public hearing means a public proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed DA permit action, or Federal project. and which affords the public an opportunity to present their views, opinions, and information on such permit actions or Federal projects.

(b) Permit action, as used herein means the evaluation of and decision on an application for a DA permit pursuant to sections 9 or 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, or section 103 of the MPRSA, as amended, or the modification, suspension or revocation of any DA permit (see 33 CFR 325.7).

(c) Federal project means a Corps of Engineers project (work or activity of any nature for any purpose which is to be performed by the Chief of Engineers pursuant to Congressional authorizations) involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters subject to section 404 of the Clean Water Act, or section 103 of the MPRSA.

§ 327.4 General polices.

(a) A public hearing will be held in connection with the consideration of a DA permit application or a Federal project whenever a public hearing is needed for making a decision on such permit application or Federal project. In addition, a public hearing may be held when it is proposed to modify or revoke a permit. (See 33 CFR 325.7).

(b) Unless the public notice specifies that a public hearing will be held, any person may request, in writing, within the comment period specified in the public notice on a DA permit application or on a Federal project, that a public hearing be held to consider the material matters at issue in the permit application or with respect to Federal project. Upon receipt of any such request, stating with particularity the reasons for holding a public hearing, the district engineer may expeditiously attempt to resolve the issues informally. Otherwise, he shall promptly set a time and place for the public hearing, and give due notice thereof, as prescribed in § 327.11 of this Part. Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing. The district engineer will make such a determination in writing. and communicate his reasons therefor to all requesting parties. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition.

(c) In case of doubt, a public hearing shall be held. HQDA has the discretionary power to require hearings in any case.

(d) in fixing the time and place for a hearing, the convenience and necessity of the interested public will be duly considered.

§ 327.5 Presiding officer.

(a) The district engineer, in whose district a matter arises, shall normally serve as the presiding officer. When the district engineer is unable to serve, he may designate the deputy district engineer or other qualified person as presiding officer. In cases of unusual interest, the Chief of Engineers or the division engineer may appoint such person as he deems appropriate to serve as the presiding officer.

(b) The presiding officer shall include in the administrative record of the permit action the request or requests for the hearing and any data or material submitted in justification thereof, materials submitted in opposition to or in support of the proposed action, the hearing transcript, and such other material as may be relevant or pertinent to the subject matter of the hearing. The administrative record shall be available for public inspection with the exception of material exempt from disclosure under the Freedom of Information Act.

§ 327.6 Legal adviser.

At each public hearing, the district counsel or his designee may serve as legal advisor to the presiding officer. In appropriate circumstances, the district engineer may waive the requirement for a legal advisor to be present.

§ 327.7 Representation.

At the public hearing, any person may appear on his own behalf, or may be represented by counsel, or by other representatives.

§ 327.8 Conduct of hearings.

(a) The presiding officer shall make an opening statement outlining the purpose of the hearing and prescribing the general procedures to be followed.

(b) Hearings shall be conducted by the presiding officer in an orderly but expeditious manner. Any person shall be permitted to submit oral or written statements concerning the subject matter of the hearing, to call witnesses who may present oral or written statements, and to present recommendations as to an appropriate decision, Any person may present written statements for the hearing record prior to the time the hearing record is closed to public submissions, and may present proposed findings and recommendations. The presiding officer shall afford participants a reasonable opportunity for rebuttal.

(c) The presiding officer shall have discretion to establish reasonable limits upon the time allowed for statements of witnesses, for arguments of parties or their counsel or representatives, and upon the number of rebuttals.

(d) Cross-examination of witnesses shall not be permitted.

(e) All public hearings shall be reported verbatim. Copies of the transcripts of proceedings may be

purchased by any person from the Corps of Engineers or the reporter of such hearing. A copy will be available for public inspection at the office of the appropriate district engineer.

(f) All written statements, charts, tabulations, and similar data offered in evidence at the hearing shall, subject to exclusion by the presiding officer for reasons of redundancy, be received in evidence and shall constitute a part of the record.

(g) The presiding officer shall allow a period of not less than 10 days after the close of the public hearing for submission of written comments.

(h) In appropriate cases, the district engineer may participate in joint public hearings with other Federal or state agencies, provided the procedures of those hearings meet the requirements of this regulation. In those cases in which the other Federal or state agency allows a cross-examination in its public hearing, the district engineer may still participate in the joint public hearing but shall not require cross examination as a part of his participation.

§ 327.9 Filing of the transcript of the public hearing.

Where the presiding officer is the initial action authority, the transcript of the public hearing, together with all evidence introduced at the public hearing, shall be made a part of the administrative record of the permit action or Federal project. The initial action authority shall fully consider the matters discussed at the public hearing in arriving at his initial decision or recommendation and shall address, in his decision or recommendation, all substantial and valid issues presented at the hearing. Where a person other than the initial action authority serves as presiding officer, such person shall forward the transcript of the public hearing and all evidence received in connection therewith to the initial action authority together with a report summarizing the issues covered at the hearing. The report of the presiding officer and the transcript of the public hearing and evidence submitted thereal shall in such cases be fully considered by the initial action authority in making his decision or recommendation to higher authority as to such permit action or Federal project.

§ 327.10 Authority of the presiding officer.

Presiding officers shall have the following authority:

(a) To regulate the course of the hearing including the order of all sessions and the scheduling thereof. after any initial session, and the recessing, reconvening, and adjournment thereof; and

(b) To take any other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authority under which the Chief of Engineers functions, and with the policies and directives of the Chief of Engineers and the Secretary of the Army.

§ 327.11 Public notice.

(a) Public notice shall be given of any public hearing to be held pursuant to this regulation, Such notice should normally provide for a period of not less than 30 days following the date of public notice during which time interested parties may prepare themselves for the hearing. Notice shall also be given to all Federal agencies affected by the proposed action, and to state and local agencies and other parties having an interest in the subject matter of the hearing. Notice shall be sent to all persons requesting a hearing and shall be posted in appropriate government buildings and provided to newspapers of general circulation for publication. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition.

(b) The notice shall contain time, place, and nature of hearing; the legal authority and jurisdiction under which the hearing is held; and location of and availability of the draft environmental impact statement or environmental assessment.

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

Sec.
328.1 Purpose.
328.2 General scope.
328.3 Definitions.
328.4 Limits of jurisdiction.
328.5 Changes in limits of waters of the United States.

Authority: 33 U.S.C. 1344.

§ 328.1 Purpose.

This section defines the term "waters of the United States" as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act. It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning "waters of the United States," The terminology used by section 404 of the Clean Water Act includes "navigable waters" which is defined at section 502(7) of the Act as "waters of the United States including the territorial seas," To provide clarity and to avoid confusion with other Corps of Engineer regulatory programs, the term "waters of the United States" is used throughout 33 CFR Parts 320—330. This section does not apply to authorities under the Rivers and Harbors Act of 1899 except that some of the same waters may be regulated under both statutes (see 33 CFR Parts 322 and 329).

§ 328.2 General scope.

Waters of the United States include those waters listed in § 328.3(a). The lateral limits of jurisdiction in those waters may be divided into three categories. The categories include the territorial seas, tidal waters, and non-tidal waters (see 33 CFR 328.4 (a), (b), and (c), respectively).

§ 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1)—(4) of this section:

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)—(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support. a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river bergs, beach dunes and the like are "adjacent wetlands."

(d) The term "high tide line" means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term "ordinary high water mark" means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving. changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term "tidal waters" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

§ 328.4 Limits of jurisdiction.

(a) *Territorial Seas.* The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles. (See 33 CFR 329.12)

(b) *Tidal Waters of the United States.* The landward limits of jurisdiction in tidal waters:

(1) Extends to the high tide line, or

(2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) *Non-Tidal Waters of the United States.* The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or

(2) When adjacent wetlands are present. the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.

(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

§ 328.5 Changes in limits of waters of the United States.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterway which also change the boundaries of the waters of the United States. For example, changing sea levels or subsidence of land may cause some areas to become waters of the United States while siltation or a change in drainage may remove an area from waters of the United States. Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer. Verification of changes to the lateral limits of jurisdiction may be obtained from the district engineer.

PART 329—DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES

Sec.

Authority: 33 U.S.C. 401 *of seq.*

§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters of the United States." This definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR Parts 323 and 328.

§ 329.2 Applicability.

This regulation is applicable to all Corps of Engineers districts and divisions having civil works responsibilities.

§ 329.3 General policies.

Precise definitions of "navigable waters of the United States" or "navigability" are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by Federal courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(a) Past, present, or potential presence of interstate or foreign commerce:

(b) Physical capabilities for use by commerce as in paragraph (a) of this section; and

(c) Defined geographic limits of the waterbody.

§ 329.6 Interstate or foreign commerce.

(a) *Nature of commerce: type. means, and extent of use.* The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in § 329.9 of this Part, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

(b) *Nature of commerce: interstate and intrastate.* Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state. (For purposes of this regulation, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

§ 329.7 intrastate or interstate nature of waterway.

A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically navigable connection across a state boundary. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction,

§ 329.8 improved or natural conditions of the waterbody.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

(a) *Existing improvements: artificial waterbodies.* (1) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area (see paragraph 329.12(b) of this Part).

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

(b) *Non-existing improvements, past or potential.* A waterbody may also be considered navigable depending on the feasibility of use to transport interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvement need not exist, be planned, nor even authorized: it is enough that potentially they could be made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement were "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement: those which may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

§ 329.9 Time at which commerce exists or determination is made.

(a) *Past use.* A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in paragraph 329.8(b) of this Part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are non-navigable, or have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined, since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

(b) *Future or potential use.* Navigability may also be found in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Non-use in the past therefore does not prevent recognition of the potential for future use.

§ 329.10 Existence of obstructions.

A stream may be navigable despite the existence of falls, rapids, sand bars. bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "'channel" of commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established,

§ 329.11 Geographic and jurisdictional limits of rivers and lakes.

(a) *Jurisdiction over entire bed.* Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies. even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.

(1) The "ordinary high water mark" on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

(2) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.

(b) *Upper limit of navigability.* The character of a river will, at some point along its length, change from navigable to non navigable. Very often that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river. The upper limit will therefore often be the same point traditionally recognized as the head of navigation, but may, under some of the tests described above. be at some point yet farther upstream.

§ 329.12 Geographic and jurisdictional **limits of oceanic and tidal waters.**

(a) *Ocean and coastal waters.* The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf. (See 33 CFR 322.3(b)).

(1) *Baseline defined,* Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured. The baseline has significance for both domestic and international law and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the baseline may have to be drawn seaward of such bodies.

(2) *Shoreward limit of jurisdiction.* Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

(b) *Bays and estuaries,* Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (a)(2) of this section) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

§ 329.13 Geographic Limits: shifting boundaries.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable waters of the United States.
Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterbody which also change the shoreline boundaries of the navigable waters of the United States. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable water of the United States, regardless that they may be dry at a particular point in time.

§ 329.14 Determination of navigability.

(a) *Effect on determinations.* Although conclusive determinations of navigability can be made only by federal Courts, those made by federal agencies are nevertheless accorded substantial weight by the courts. It is therefore necessary that when jurisdictional questions arise, district personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under guidelines set out above, as the resulting determination may have substantial impact upon a judicial body. Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law.

(b) *Procedures of determination.* A determination whether a waterbody is a navigable water of the United States will be made by the division engineer, and will be based on a report of findings prepared at the district level in accordance with the criteria set out in this regulation. Each report of findings will be prepared by the district engineer, accompanied by an opinion of the district counsel, and forwarded to the division engineer for final determination. Each report of findings will be based substantially on applicable portions of the format in paragraph (c) of this section.

(c) *Suggested format of report of findings:*

(1) Name of waterbody:

(2) Tributary to:

(3) Physical characteristics:

(i) Type: (river, bay, slough, estuary, etc.)

(ii) Length:

(iii) Approximate discharge volumes: Maximum, Minimum, Mean:

(iv) Fall per mile:

(v) Extent of tidal influence:

(vi) Range between ordinary high and ordinary low water:

(vii) Description of improvements to navigation not listed in paragraph (c)(5) of this section:

(4) Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interstate commerce:

(5) Authorized projects:

(i) Nature, condition and location of any improvements made under projects authorized by Congress:

(ii) Description of projects authorized but not constructed:

(iii) List of known survey documents or reports describing the waterbody:

(6) Past or present interstate commerce:

(i) General types, extent, and period in time:

(ii) Documentation if necessary:

(7) Potential use for interstate commerce, if applicable:

(i) If in natural condition:

(ii) If improved:

(8) Nature of jurisdiction known to have been exercised by Federal agencies if any:

(9) State or Federal court decisions relating to navigability of the waterbody, if any:

(10) Remarks:

(11) Finding of navigability (with date) and recommendation for determination:

§ 329.15 Inquiries regarding determinations.

(a) Findings and determinations should be made whenever a question arises regarding the navigability of a waterbody. Where no determination has been made, a report of findings will be prepared and forwarded to the division engineer, as described above. Inquiries may be answered by an interim reply which indicates that a final agency determination must be made by the division engineer. If a need develops for an emergency determination, district engineers may act in reliance on a finding prepared as in Section 329.14 of this Part. The report of findings should then be forwarded to the division engineer on an expedited basis.

(b) Where determinations have been made by the division engineer, inquiries regarding the *navigability* of specific portions of waterbodies covered by these determinations may be answered as follows:

This Department, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that _____ (River) (Bay) (Lake, etc.) is a navigable water of the United States from to _____. Actions which modify or otherwise affect those waters are subject to the jurisdiction of this Department, whether such actions occur within or outside the navigable areas.

(c) Specific inquiries regarding the *jurisdiction* of the Corps of Engineers can be answered only after a determination whether (1) the waters are navigable waters of the United States or (2) if not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.

§ 329.16 Use and maintenance of lists of determinations.

(a) Tabulated lists of final determinations of navigability are to be maintained in each district office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.

(b) It should be noted that the lists represent only those waterbodies for which determinations have been made: absence from that list should not be taken as an indication that the waterbody is not navigable.

(c) Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-. navigable is deemed necessary, an updated finding should be forwarded to the division engineer: changes are not considered final until a determination has been made by the division engineer.

PART 330—NATIONWIDE PERMITS

Sec.

Authority: 33 U.S.C. 401 et seq.: 33 U.S.C. 1344: 33 U.S.C. 1413.

§ 330.1 General.

The purpose of this regulation is to describe the Department of the Army's (DA) nationwide permit program and to list all current nationwide permits which have been issued by publication herein. A nationwide permit is a form of general permit which may authorize activities throughout the nation. (Another type of general permit is a "regional permit" and is issued by division or district engineers on a regional basis in accordance with 33 CFR Part 325). Copies of regional conditions and modifications, if any, to the nationwide permits can be obtained from the appropriate district engineer. Nationwide permits are designed to allow certain activities to occur with little, if any, delay or paperwork. Nationwide permits are valid only if the conditions applicable to the nationwide permits are met. Failure to comply with a condition does not necessarily mean the activity cannot be authorized but rather that the activity can only be authorized by an individual or regional permit. Several of the nationwide permits require notification to the district engineer prior to commencement of the authorized activity. The procedures for this notification are located at § 330.7 of this Part. Nationwide permits can be issued to satisfy the requirements of section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act. and/or section 103 of the Marine Protection, Research and Sanctuaries Act. The applicable authority is indicated at the end of each nationwide permit.

§ 330.2 Definitions.

(a) The definitions of 33 CFR Parts 321—329 are applicable to the terms used in this Part.

(b) The term "headwaters" means the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second. The district engineer may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means. For streams that are dry for long periods of the year, district engineers may establish the "headwaters" as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time.

(c) Discretionary authority means the authority delegated to division engineers in § 330.8 of this part to override provisions of nationwide permits, to add regional conditions, or to require individual permit application.

§ 330.3 Activities occurring before certain dates.

The following activities were permitted by nationwide permits issued on July 19, 1977, and unless modified do not require further permitting:

(a) Discharges of dredged or fill material into waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which began. July 25, 1975, and extended section 404 jurisdiction to all waters of the United

States. (These phase-in dates are: After July 25. 1975, discharges .into navigable waters of the United States and adjacent wetlands; after September 1. 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area: and after July 1, 1977, discharges into all waters of the United States.) (Section 404)

(b) Structures or work completed before December 18, 1968, or in waterbodies over which the district engineer had not asserted jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation. (Section 10)

§ 330.4 Public notice.

(a) *Chief of Engineers.* Upon proposed issuance of new nationwide permits, modification to, or reissuance of, existing nationwide permits, the Chief of Engineers will publish a notice in the **Federal Register** seeking public comments and including the opportunity for a public hearing. This notice will state the availability of information at the Office of the Chief of Engineers and at all district offices which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance under general permit authority. The Chief of Engineers will prepare this information which will be supplemented, if appropriate, by division engineers.

(b) *District engineers.* Concurrent with publication in the **Federal Register** of proposed, new, or reissued nationwide permits by the Chief of Engineers, district engineers will so notify the known interested public by an appropriate notice. The notice will include regional conditions, if any, developed by the division engineer.

§ 330.5 Nationwide permits.

(a) *Authorized activities.* The following activities are hereby permitted provided they meet the conditions listed in paragraph (b) of this section and, where required, comply with the notification procedures, of § 330.7.

(1) The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (33 CFR Part 66, Subchapter C). (Section 10)

(2) Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR Part 322.5(g)). (Section 10)

(3) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill constructed prior to the requirement for authorization, provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure or fill, and further provided that the structure or fill has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted. Maintenance dredging and beach restoration are not authorized by this nationwide permit. (Section 10 and 404)

(4) Fish and wildlife harvesting devices and activities such as pound nets, crab traps, eel pots, lobster traps, duck blinds, and clam and oyster digging. (Section 10)

(5) Staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar scientific structures. (Section 10)

(6) Survey activities including core sampling, seismic exploratory operations, and plugging of seismic shot holes and other exploratory-type bore holes. Drilling of exploration-type bore holes for oil and gas exploration is not authorized by this nationwide permit; the plugging of such holes is authorized, (Sections 10 and 404).

(7) Outfall structures and associated intake structures where the effluent from that outfall has been permitted under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act) (see 40 CFR Part 122) provided that the district or division engineer makes a determination that the individual and cumulative adverse environmental effects of the structure itself are minimal in accordance with § 330.7 (c)(2) and (d). Intake structures per se are not included—only those directly associated with an outfall structure are covered by this nationwide permit. This permit includes minor excavation, filling and other work associated with installation of the intake and outfall structures. (Sections 10 and 404)

(8) Structures for the exploration. production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of Interior, Mineral Management Service, provided those structures are not placed within the limits of any designated shipping safety fairway or traffic separation scheme (where such limits have not been designated or where changes are anticipated, district engineers will consider recommending the discretionary authority provided by 330.8 of this Part, and further subject to the provisions of the fairway regulations in 33 CFR 322.5(1) (Section 10).

(9) Structures placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established for that purpose by the U.S. Coast Guard. (Section 10)

(10) Non-commercial, single-boat, mooring buoys. (Section 10)

(11) Temporary buoys and markers placed for recreational use such as water skiing and boat racing provided that the buoy or marker is removed within 30 days after its use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 10)

(12) Discharge of material for backfill or bedding for utility lines, including outfall and intake structures, provided there is no change in preconstruction bottom contours (excess material must be removed to an upland disposal area). A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquifiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. (The utility line and outfall and intake structures will require a Section 10 permit if in navigable waters of the United States. See 33 CFR Part 322. See also paragraph (a)(7) of this section). (Section 404)

(13) Bank stabilization activities provided:

(i) The bank stabilization activity is less than 500 feet in length;

(ii) The activity is necessary for erosion prevention;

(iii) The activity is limited to less than an average of one cubic yard per running foot placed along the bank within waters of the United States;

(iv) No material is placed in excess of the minimum needed for erosion protection;

(v) No material is placed in any wetland area;

(vi) No material is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;

(vii) Only clean material free of waste metal products, organic materials, unsightly debris, etc. is used; and

(viii) The activity is a single and complete project. (Sections 10 and 404)

(14) Minor road crossing fills including all attendant features, both temporary and permanent, that are part of a single and complete project for crossing of a non-tidal waterbody, provided that the crossing is culverted, bridged or otherwise designed to prevent the restriction of, and to withstand, expected high flows and provided further that discharges into any wetlands adjacent to the waterbody do not extend beyond 100 feet on either side of the ordinary high water mark of that waterbody. A "minor road crossing fill" is defined as a crossing that involves the discharge of less than 200 cubic yards of fill material below the plane of ordinary high water. The crossing may require a permit from the US Coast Guard if located in navigable waters of the United States. Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4). District engineers are authorized, where local circumstances indicate the need, to define the term "expected high flows" for the purpose of establishing applicability of this nationwide permit. (Sections 10 and 404)

(15) Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such discharge has been authorized by the US Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this nationwide permit and will require an individual or regional Section 404 permit. (Section 404)

(16) Return water from an upland, contained dredged material disposal area (see 33 CFR 323.2(d)) provided the state has issued a site specific or generic certification under section 401 of the Clean Water Act (see also 33 CFR 325.2(b)(1)). The dredging itself requires a Section 10 permit if located in navigable waters of the United States. The return water or runoff from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d) even though the disposal itself occurs on the upland and thus does not require a section 404 permit. This nationwide permit satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. (Section 404)

(17) Fills associated with small hydropower projects at existing reservoirs where the project which includes the fill is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; has a total generating capacity of not more than 1500 kw (2.000 horsepower); qualifies for the short-form licensing procedures of the FERC (see 18 CFR 4.61); and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment are minimal in accordance with § 330.7 (c)(2) and (d). (Section 404)

(18) Discharges of dredged or fill material into all waters of the United States other than wetlands that do not exceed ten cubic yards as part of a single and complete project provided the material is not placed for the purpose of stream diversion. (Sections 10 and 404)

(19) Dredging of no more than ten cubic yards from navigable waters of the United States as part of a single and complete project. This permit does not authorize the connection of canals or other artificial waterways to navigable waters of the United States (see Section 33 CFR 322.5(g)). (Section 10)

(20) Structures, work, and discharges for the containment and cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan, (40 CFR Part 300), provided the Regional Response Team which is activated under the Plan concurs with the proposed containment and cleanup action. (Sections 10 and 404)

(21) Structures, work, discharges associated with surface coal mining activities provided they were authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977; the appropriate district engineer is given the opportunity to review the Title V permit application and all relevant Office of Surface Mining or state (as the case may be) documentation prior to any decision on that application; and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment from such structures, work, or discharges are minimal in accordance with § § 330.7 (c) (2) and (3) and (d). (Sections 10 and 404)

(22) Minor work, fills, or temporary structures required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This permit does not authorize maintenance dredging, shoal removal, or river bank snagging. (Sections 10 and 404)

(23) Activities, work, and discharges undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another federal agency or department where that agency or department has determined, pursuant to the CEQ Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1500 et seq.), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and the Office of the Chief of Engineers (ATTN: DAEN-CWO—N) has been furnished notice of the agency's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this nationwide permit of any agency's categorical exclusions, the Chief of Engineers will solicit comments through publication in the Federal Register. (Sections 10 and 404)

(24) Any activity permitted by a state administering its own Section 404 permit program for the discharge of dredged or fill material authorized at 33 U.S.C. 1344(g)—(l) *is* permitted pursuant to section 10 of the Rivers and Harbors Act of 1899. Those activities which do not involve a section 404 state permit are not included in this nationwide permit but many will be exempted by section 154 of Pub. L. 94—587. (See 33 CFR 322.3(a)(2)). (Section 10)

(25) Discharge of concrete into tightly sealed forms or cells where the concrete is used as a structural member which would not otherwise be subject to Clean Water Act jurisdiction. (Section 404)

(26) Discharges of dredged or fill material into the waters listed in paragraphs (a)(26) (i) and (ii) of this section except those which cause the loss or substantial adverse modificatioi$_1$ of 10 acres or more of such waters of the United States, including wetlands. For discharges which cause the loss or substantial adverse modification of 1 to 10 acres of such waters, including wetlands, notification to the district engineer is required in accordance with section 330.7 of this section. (Section 404).

(i) Non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are located above the headwaters.

(ii) Other non-tidal waters of the United States, including adjacent wetlands, that are not part of a surface tributary system to interstate waters or

navigable waters of the United States (i.e., isolated waters).

(b) *Conditions.* The following special conditions must be followed in order for the nationwide permits identified in paragraph (a) of this section to be valid:

(1) That any discharge of dredged or fill material will not occur in the proximity of a public water supply intake.

(2) That any discharge of dredged or fill material will not occur in areas of concentrated shellfish production unless the discharge is directly related to a shellfish harvesting activity authorized by paragraph (a)(4) of this section.

(3) That the activity will not jeopardize a threatened or endangered species as identified under the Endangered Species Act (ESA), or destroy or adversely modify the critical habitat of such species. In the case of federal agencies, it is the agencies' responsibility to comply with the requirements of the ESA. If the activity may adversely affect any listed species or critical habitat, the district engineer must initiate Section 7 consultation in accordance with the ESA. in such cases, the district engineer may:

(i) Initiate section 7 consultation and then, upon completion, authorize the activity under the nationwide permit by adding, if appropriate, activity specific conditions, or

(ii) Prior to or concurrent with section 7 consultation he may recommend discretionary authority (See section 330.8) or use modification, suspension, or revocation procedures (See 33 CFR 325.7).

(4) That the activity shall not significantly disrupt the movement of those species of aquatic life indigenous to the waterbody (unless the primary purpose of the fill is to impound water);

(5) That any discharge of dredged or fill material shall consist of suitable material free from toxic pollutants (see section 307 of the Clean Water Act) in toxic amounts;

(6) That any structure or fill authorized shall be properly maintained.

(7) That the activity will not occur in a component of the National Wild and Scenic River System; nor in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status;

(8) That the activity shall not cause an unacceptable interference with navigation;

(9) That, if the activity may adversely affect historic properties which the National Park Service has listed on, or determined eligible for listing on, the National Register of Historic Places, the permittee will notify the district engineer. If the district engineer determines that such historic properties may be adversely affected, he will provide the Advisory Council on Historic Preservation an opportunity to comment on the effects on such historic properties or he will consider modification, suspension, or revocation in accordance with 33 CFR 325.7. Furthermore, that, if the permittee before or during prosecution of the work authorized, encounters a historic property that has not been listed or determined eligible for listing on the National Register, but which may be eligible for listing in the National Register. he shall immediately notify the district engineer;

(10) That the construction or operation of the activity will not impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights;

(11) That in certain states, an individual state water quality certification must be obtained or waived (See § 330.9);

(12) That in certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (See § 330.10);

(13) That the activity will comply with regional conditions which may have been added by the division engineer (See § 330.8(a)); and

(14) That the management practices listed in § 330.6 of this part shall be followed to the maximum extent practicable.

(c) *Further information.* (1) District engineers are authorized to determine if an activity complies with the terms and conditions of a nationwide permit unless that decision must be made by the division engineer in accordance with § 330.7.

(2) Nationwide permits do not obviate the need to obtain other Federal, state or local authorizations required by law,

(3) Nationwide permits do not grant any property rights or exclusive privileges.

(4) Nationwide permits do not authorize any injury to the property or rights of others.

(5) Nationwide permits do not authorize interference with any existing or proposed Federal project.

(d) *Modification, Suspension or Revocation of Nationwide Permits.* The Chief of Engineers may modify, suspend, or revoke nationwide permits in accordance with the relevant procedures of 33 CFR 325.7. Such authority includes, but is not limited to: adding individual, regional, or nationwide conditions; revoking authorization for a category of activities or a category of waters by requiring individual or regional permits; or revoking an authorization on a case-by-case basis. This authority is not limited to concerns for the aquatic environment as is the discretionary authority in § 330.8.

§ 330.6 Management practices.

(a) In addition to the conditions specified in § 330.5 of this Part, the following management practices shall be followed, to the maximum extent practicable, in order to minimize the adverse effects of these discharges on the aquatic environment. Failure to comply with these practices may be cause for the district engineer to recommend, or the division engineer to take, discretionary authority to regulate the activity on an individual or regional basis pursuant to § 330.8 of this Part.

(1) Discharges of dredged or fill material into waters of the United States shall be avoided or minimized through the use of other practical alternatives.

(2) Discharges in spawning areas during spawning seasons shall be avoided.

(3) Discharges shall not restrict or impede the movement of aquatic species indigenous to the waters or the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).

(4) If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized,

(5) Discharge in wetlands dress shall be avoided.

(6) Heavy equipment working in wetlands shall be placed on mats.

(7) Discharges into breeding areas for migratory waterfowl shall be avoided.

(8) All temporary fills shall be removed in their entirety.

§ 330.7 Notification procedures.

(a) The general permittee shall not begin discharges requiring pre-discharge notification pursuant to the nationwide permit at § 330.5(a)(26):

(1) Until notified by the district engineer that the work may proceed under the nationwide permit with any special conditions imposed by the district or division engineer; or

(2) if notified by the district or division engineer that an individual permit may be required; or

(3) Unless 20 days have passed from receipt of the notification by the district engineer arid no notice has been

received from the district or division engineer.

(b) Notification pursuant to the nationwide permit at § 330.5(a)(26) must be in writing and include the information listed below. Notification is not an admission that the proposed work would result in more than minimal impacts to waters of the United States; it simply allows the district or division engineer to evaluate specific activities for compliance with general permit criteria.

(1) Name, address, and phone number of the general permittee;

(2) Location of the planned work; (3) Brief description of the proposed work, its purpose, and the approximate size of the waters, including wetlands, which would be lost or substantially adversely modified as a result of the work; and

(4) Any specific information required by the nationwide permit and any other information that the permittee believes is appropriate.

(c) *District engineer review of notification.* Upon receipt of notification, the district engineer will promptly review the general permittee's notification to determine which of the following procedures should be followed:

(1) If the nationwide permit at § 330.5(a)(26) is involved and the district engineer determines either, (i) the proposed activity falls within a class of discharges or will occur in a category of waters which has been previously identified by the Regional Administrator, Environmental Protection Agency; the Regional Director, Fish and Wildlife Service; the Regional Director, National Marine Fisheries Service; or the heads of the appropriate state natural resource agencies as being of particular interest to those agencies; or (ii) the particular discharge has not been previously identified but he believes it may be of importance to those agencies, he will promptly forward the notification to the division engineer and the head and appropriate staff officials of those agencies to afford those agencies an adequate opportunity before such discharge occurs to consider such notification and express their views, if any, to the district engineer concerning whether individual permits should be required.

(2) If the nationwide permits at § 330.5(a) *(7),* (17), or (21) are involved and the Environmental Protection Agency, the Fish and Wildlife Service, the National Marine Fisheries Service or the appropriate state natural resource or water quality agencies forward concerns to the district engineer, he will forward those concerns to the division engineer together with a statement of the factors pertinent to a determination of the environmental effects of the proposed discharges, including those set forth in the 404(b)(1) guidelines, and his views on the specific points raised by those agencies.

(3) If the nationwide permit at § 330.5(a)(21) is involved the district engineer will give notice to the Environmental Protection Agency and the appropriate state water quality agency. This notice will include as a minimum the information required by paragraph (b) of this section.

(d) *Division engineer review of notification.* The division engineer will review all notifications referred to him in accordance with paragraph (c)(1) or (c)(2) of this section. The division engineer will require an individual permit when he determines that an activity does not comply with the terms or conditions of a nationwide permit or does not meet the definition of a general permit (see 33 CFR 322.2(f) and 323.2(n)) including discharges under the nationwide permit at § 330.5(a)(26) which have more than minimal adverse environmental effects on the aquatic environment when viewed either cumulatively or separately. In reaching his decision, he will review factors pertinent to a determination of the environmental effects of the proposed discharge, including those set forth in the 404(b)(1) guidelines, and will give full consideration to the views, if any, of the federal and state natural resource agencies identified in paragraph (c) of this section. If the division engineer decides that an individual permit is not required, and a federal or appropriate state natural resource agency has indicated in writing that an activity may result in more than minimal adverse environmental impacts, he will prepare a written statement, available to the public on request, which sets forth his response to the specific points raised by the commenting agency. When the division engineer reaches his decision he will notify the district engineer, who will immediately notify the general permittee of the division engineer's decision.

§ 330.8 Discretionary authority.

Except as provided in paragraphs (c) (2) and (d) of this section, division engineers on their own initiative or upon recommendation of a district engineer are authorized to modify nationwide permits by adding regional conditions or to override nationwide permits by requiring individual permit applications on a case-by-case basis, for a category of activities, or in specific geographic areas. Discretionary authority will be based on concerns for the aquatic environment as expressed in the guidelines published by EPA pursuant to section 404(b)(1). (40 CFR Part 230)

(a) *Activity Specific conditions.* Division engineers are authorized to modify nationwide permits by adding individual conditions on a case-by-case basis applicable to certain activities within their division. Activity specific conditions may be added by the District Engineer in instances where there is mutual agreement between the district engineer and the permittee. Furthermore, district engineers will condition NWPs with conditions which have been imposed on a state section 401 water quality certification issued pursuant to § 330.9 of this Part.

(b) *Regional conditions.* Division engineers are authorized to modify nationwide permits by adding conditions on a generic basis applicable to certain activities or specific geographic areas within their divisions. In developing regional conditions, division and district engineers will follow standard permit processing procedures as prescribed in 33 CFR Part 325 applying the evaluation criteria of 33 CFR Part 320 and appropriate parts of 33 CFR Parts 321, 322, 323, and 324. Division and district engineers will take appropriate measures to inform the public of the additional conditions.

(c) *Individual permits—(1) Case-by-Case.* In nationwide permit cases where additional individual or regional conditioning may not be sufficient to address concerns for the aquatic environment or where there is not sufficient time to develop such conditions under paragraphs (a) or (b) of this section, the division engineer may suspend use of the nationwide permit and require an individual permit application on a case-by-case basis. The district engineer will evaluate the application and will either issue or deny a permit. However, if at any time the reason for taking discretionary authority is satisfied, then the division engineer may remove the suspension, reactivating authority under the nationwide permit. Where time is of the essence, the district engineer may telephonically recommend that the division engineer assert discretionary authority to require an individual permit application for a specific activity. If the division engineer concurs, he may orally authorize the district engineer to implement that authority. Oral authorization should be followed by written confirmation.

(2) *Category.* Additionally, after notice and opportunity for public hearing, division engineers may decide that individual permit applications

should be required for categories of activities, or in specific geographic areas. However, only the Chief of Engineers may modify, suspend, or revoke nationwide permits on a statewide or nationwide basis. The division engineer will announce the decision to persons affected by the action. The district engineer will then regulate the activity or activities by processing an application(s) for an individual permit(s) pursuant to 33 CFR Part 325.

(d) For the nationwide permit found at § 330.5(a)(26). after the applicable provisions of § 330.7(a) (1) and (3) have been satisfied, the permittee's right to proceed under the general permit may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 325.7.

(e) A copy of all modifications or revocations of activities covered by nationwide permits will be forwarded to the Office of the Chief of Engineers, ATFN: DAEN—CWO--N.

§ 330.9 State water quality certification.

(a) State water quality certification is required for nationwide permits which may result in any discharge into waters of the United States. If a state issues a water quality certification which includes special conditions, the district engineer will add these conditions as conditions of the nationwide permit in that state. However, if such conditions do not comply with the provisions of 33 CFR 325.4 or if a state denies a required 401 certification for a particular nationwide permit, authorization for all discharges covered by the nationwide permit within the state is denied without prejudice until the state issues an individual or generic water quality certification or waives its right to do so. A district engineer will not process an individual permit application for an activity for which authorization has been denied without prejudice under the nationwide permit program. However, if the division engineer determines that it would otherwise be appropriate to exercise his discretionary authority, pursuant to § 330.8, to override the nationwide permit or permits in question, he may do so, and the district engineer may proceed with the processing of individual permit applications. In instances where a state has denied the 401 water quality certification for discharges under a particular nationwide permit, applicants must furnish the district engineer with an individual or generic 401 certification or a copy of the application to the state for the certification. If a state fails to act within a reasonable period of time (see § 325 2(b)(1)(ii)), a waiver will be presumed. Upon receipt of an individual or generic certification or a waiver of certification, the proposed work is authorized under the nationwide permit. If a state issues a conditioned individual certification, the district engineer will include those conditions that comply with 33 CFR 325.4 as special conditions of the nationwide permit (see 33 CFR Part 330.8(a)) and notify the applicant that the work is authorized under the nationwide permit provided all conditions are met.

(b) Certification requirements for nationwide permits fall into the following general categories:

(1) *No certification required.* Nationwide permits numbered 1, 2, 4, 5, 8, 9, 10, 11, and 19 do not involve activities which may result in a discharge and therefore 401 certification is not applicable.

(2) *Certification sometimes required.* Nationwide permits numbered 3, 6, 7, 13, 20, 21, 22, and 23 each involve various activities, some of which may result in a discharge and require certification, and others of which do not. State denial of certification for any specific nationwide permit in this category affects only those activities involving discharges, Those not involving discharges remain in effect.

(3) *Certification required.* Nationwide permits numbered 12, 14, 15, 16, 17, 18, 24, 25, and 26 involve activities which would result in discharges and therefore 401 certification is required.

(c) District engineers will take appropriate measures to inform the public of which waterbodies or regions within the state, and for which nationwide permits, an individual 401 water quality certification is required.

§ 330.10 Coastal zone management consistency determination.

In instances where a state has not concurred that a particular nationwide permit is consistent with an approved coastal zone management plan, authorization for all activities subject to such nationwide permit within or affecting the state coastal zone agency's area of authority is denied without prejudice until the applicant has furnished to the district engineer a coastal zone management consistency determination pursuant to section 307 of the Coastal Zone Management Act and the state has concurred in it. If a state does not act on an applicant's consistency statement within six months after receipt by the state, consistency shall be presumed. District engineers will take appropriate measures to inform the public of which waterbodies or regions within the state, and for which nationwide permits, such individual consistency determination is required. District engineers will not process any permit application for an activity which has been denied without prejudice under the nationwide permit program. However, if the division engineer determines that it would otherwise be appropriate to exercise his discretionary authority, pursuant to § 330.8, to override the nationwide permit or permits in question, he may do so, and the district engineer may proceed with the processing of individual permit applications.

§ 330.11 Nationwide permit verification.

(a) General permittees may, and in some cases must, request from a district engineer confirmation that an activity complies with the terms and conditions of a nationwide permit. District engineers will respond promptly to such requests. The response will state that the verification is valid for a period of no more than two years or a lesser period of time if deemed appropriate. Section 330.12 takes precedence over this section, therefore, it is incumbent upon the permittee to remain informed of changes to nationwide permits.

(b) If the district engineer decides that an activity does not comply with the terms or conditions of a nationwide permit, he will so notify the person desiring to do the work and indicate that an individual permit is required (unless covered by a regional permit).

(c) If the district engineer decides that an activity does comply with the terms and conditions of a nationwide permit he will so notify the general permittee. In such cases, as with any activity which qualifies under a nationwide permit, the general permittee's right to proceed with the activities under the nationwide permit may be modified, suspended, or revoked only in accordance with the procedures of 33 CFR 325.7.

§ 330.12 Expiration of nationwide permits.

The Chief of Engineers will review nationwide permits on a continual basis, and will decide to either modify, reissue (extend) or revoke the permits at least every five years. If a nationwide permit is not modified or reissued within five years of publication in the Federal Register, it automatically expires and becomes null and void. Authorization of activities which have commenced or are under contract to commence in reliance upon a nationwide permit will remain in effect provided the activity is completed within twelve months of the date a nationwide permit has expired or was revoked unless discretionary permit authority has been exercised in

accordance with § 330.8 of this Part or modification, suspension, or revocation procedures are initiated in accordance with the relevant provisions of 33 CFR 325.7. Activities completed under the authorization of a nationwide permit which was in effect at the time the activity was completed continue to be authorized by that nationwide permit.

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NATIONWIDE PERMIT PROGRAM

AUTHORITY: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

Sec. 330.1 Purpose and policy.

a. **Purpose.** This Part describes the policy and procedures used in the Department of the Army's nationwide permit program to issue, modify, suspend, or revoke nationwide permits; to identify conditions, limitations, and restrictions on the nationwide permits; and, to identify any procedures, whether required or optional, for authorization by nationwide permits.

b. **Nationwide permits.** Nationwide permits (NWPs) are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts. The NWPs are proposed, issued, modified, reissued (extended), and revoked from time to time after an opportunity for public notice and comment. Proposed NWPs or modifications to or reissuance of existing NWPs will be adopted only after the Corps gives notice and allows the public an opportunity to comment on and request a public hearing regarding the proposals. The Corps will give full consideration to all comments received prior to reaching a final decision.

c. **Terms and conditions.** An activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions. Activities that do not qualify for authorization under an NWP still may be authorized by an individual or regional general permit. The Corps will consider unauthorized any activity requiring Corps

authorization if that activity is under construction or completed and does not comply with all of the terms and conditions of an NWP, regional general permit, or an individual permit. The Corps will evaluate unauthorized activities for enforcement action under 33 CFR Part 326. The district engineer (DE) may elect to suspend enforcement proceedings if the permittee modifies his project to comply with an NWP or a regional general permit. After considering whether a violation was knowing or intentional, and other indications of the need for a penalty, the DE can elect to terminate an enforcement proceeding with an after-the-fact authorization under an NWP, if all terms and conditions of the NWP have been satisfied, either before or after the activity has been accomplished.

d. **Discretionary Authority.**District and division engineers have been delegated a discretionary authority to suspend, modify, or revoke authorizations under an NWP. This discretionary authority may be used by district and division engineers only to further condition or restrict the applicability of an NWP for cases where they have concerns for the aquatic environment under the Clean Water Act Section 404(b)(1) Guidelines or for any factor of the public interest. Because of the nature of most activities authorized by NWP, district and division engineers will not have to review every such activity to decide whether to exercise discretionary authority. The terms and conditions of certain NWPs require the DE to review the proposed activity before the NWP authorizes its construction. However, the DE has the discretionary authority to review any activity authorized by NWP to determine whether the activity complies with the NWP. If the DE finds that the proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest, he shall modify the NWP authorization to reduce or eliminate those adverse effects, or he shall instruct the prospective permittee to apply for a regional general permit or an individual permit. Discretionary authority is also discussed at 33 CFR(e) and 330.5.

e. **Notifications.**

1. In most cases, permittees may proceed with activities authorized by NWPs without notifying the DE. However, the prospective permittee should carefully review the language of the NWP to ascertain whether he must notify the DE prior to commencing the authorized activity. For NWPs requiring advance notification, such notification must be made in writing as early as possible prior to commencing the proposed activity. The permittee may presume that his project qualifies for the NWP unless he is otherwise notified by the DE within a 30-day period. The 30- day period starts on the date of receipt of the notification in the Corps district office and ends 30 calendar days later regardless of weekends or holidays. If the DE notifies the prospective permittee that the notification is incomplete, a new 30-day period will commence upon receipt of the revised notification. The prospective permittee may not proceed with the proposed activity before expiration of the 30-day period unless otherwise notified by the DE. If the DE fails to act within the 30-day period, he must use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the NWP authorization.

2. The DE will review the notification and may add activity-specific conditions to ensure that the activity complies with the terms and conditions of the NWP and

that the adverse impacts on the aquatic environment and other aspects of the public interest are individually and cumulatively minimal.

3. For some NWPs involving discharges into wetlands, the notification must include a wetland delineation. The DE will review the notification and determine if the individual and cumulative adverse environmental effects are more than minimal. If the adverse effects are more than minimal the DE will notify the prospective permittee that an individual permit is required or that the prospective permittee may propose measures to mitigate the loss of special aquatic sites, including wetlands, to reduce the adverse impacts to minimal. The prospective permittee may elect to propose mitigation with the original notification. The DE will consider that proposed mitigation when deciding if the impacts are minimal. The DE shall add activity-specific conditions to ensure that the mitigation will be accomplished. If sufficient mitigation cannot be developed to reduce the adverse environmental effects to the minimal level, the DE will not allow authorization under the NWP and will instruct the prospective permittee on procedures to seek authorization under an individual permit.

f. **Individual Applications.** DEs should review all incoming applications for individual permits for possible eligibility under regional general permits or NWPs. If the activity complies with the terms and conditions of one or more NWP, he should verify the authorization and so notify the applicant. If the DE determines that the activity could comply after reasonable project modifications and/or activity-specific conditions, he should notify the applicant of such modifications and conditions. If such modifications and conditions are accepted by the applicant, verbally or in writing, the DE will verify the authorization with the modifications and conditions in accordance with 33 CFR 330.6(a). However, the DE will proceed with processing the application as an individual permit and take the appropriate action within 15 calendar days of receipt, in accordance with 33 CFR 325.2(a)(2), unless the applicant indicates that he will accept the modifications or conditions.

g. **Authority.** NWPs can be issued to satisfy the permit requirements of Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, Section 103 of the Marine Protection, Research, and Sanctuaries Act, or some combination thereof. The applicable authority will be indicated at the end of each NWP. NWPs and their conditions previously published at 33 CFR 330.5 and 330.6 will remain in effect until they expire or are modified or revoked in accordance with the procedures of this Part.

Sec. 330.2 Definitions.

a. The definitions found in 33 CFR Parts 320-329 are applicable to the terms used in this Part.

b. ***Nationwide permit*** refers to a type of general permit which authorizes activities on a nationwide basis unless specifically limited. (Another type of general permit is a "regional permit" which is issued by division or district engineers on a regional basis in

accordance with 33 CFR Part 325). (See 33 CFR 322.2(f) and 323.2(h) for the definition of a general permit.)

c. ***Authorization*** means that specific activities that qualify for an NWP may proceed, provided that the terms and conditions of the NWP are met. After determining that the activity complies with all applicable terms and conditions, the prospective permittee may assume an authorization under an NWP. This assumption is subject to the DE's authority to determine if an activity complies with the terms and conditions of an NWP. If requested by the permittee in writing, the DE will verify in writing that the permittee's proposed activity complies with the terms and conditions of the NWP. A written verification may contain activity-specific conditions and regional conditions which a permittee must satisfy for the authorization to be valid.

d. ***Headwaters*** means non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second. The DE may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means. For streams that are dry for long periods of the year, DEs may establish the point where headwaters begin as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time.

e. ***Isolated waters*** means those non-tidal waters of the United States that are: **(1)** Not part of a surface tributary system to interstate or navigable waters of the United States; and **(2)** Not adjacent to such tributary waterbodies.

f. ***Filled area*** means the area within jurisdictional waters which is eliminated or covered as a direct result of the discharge (i.e., the area actually covered by the discharged material). It does not include areas excavated nor areas impacted as an indirect effect of the fill.

g. ***Discretionary authority*** means the authority described in sections (d) and 330.4(e) which the Chief of Engineers delegates to division or district engineers to modify an NWP authorization by adding conditions, to suspend an NWP authorization, or to revoke an NWP authorization and thus require individual permit authorization.

h. ***Terms and conditions.*** The *"terms"* of an NWP are the limitations and provisions included in the description of the NWP itself. The *"conditions"* of NWPs are additional provisions which place restrictions or limitations on all of the NWPs. These are published with the NWPs. Other conditions may be imposed by district or division engineers on a geographic, category-of-activity, or activity-specific basis (See 33 CFR 330.4(e)).

i. ***Single and complete project*** means the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. For example, if construction of a residential development affects several different areas of a headwater or isolated water, or several different headwaters or isolated waters, the cumulative total of all filled areas should be the basis for deciding whether or not the project will be covered by an NWP. For linear projects, the "single and complete project" (i.e. single and

complete crossing) will apply to each crossing of a separate water of the United States (i.e. single waterbody) at that location; except that for linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies.

j. ***Special aquatic sites*** means wetlands, mudflats, vegetated shallows, coral reefs, riffle and pool complexes, sanctuaries, and refuges as defined at 40 CFR 230.40 thru 230.45.

Sec. 330.3 Activities occurring before certain dates.

The following activities were permitted by NWPs issued on July 19, 1977, and, unless the activities are modified, they do not require further permitting:

a. Discharges of dredged or fill material into waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which extended Section 404 jurisdiction to all waters of the United States. The phase-in dates were: after July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States, including wetlands. (Section 404)

b. Structures or work completed before December 18, 1968, or in waterbodies over which the DE had not asserted jurisdiction at the time the activity occurred, provided in both instances, there is no interference with navigation. Activities completed shoreward of applicable Federal Harbor lines before May 27, 1970 do not require specific authorization. (Section 10)

Sec. 330.4 Conditions, limitations, and restrictions.

a. **General.** A prospective permittee must satisfy all terms and conditions of an NWP for a valid authorization to occur. Some conditions identify a "threshold" that, if met, requires additional procedures or provisions contained in other paragraphs in this section. It is important to remember that the NWPs only authorize activities from the perspective of the Corps regulatory authorities and that other Federal, state, and local permits, approvals, or authorizations may also be required.

b. **Further information.**

1. DEs have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other Federal, state, or local permits,

approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project.

c. **State 401 water quality certification.**

1. State 401 water quality certification pursuant to Section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States.

2. If, prior to the issuance or reissuance of such NWPs, a state issues a 401 water quality certification which includes special conditions, the division engineer will make these special conditions regional conditions of the NWP for activities which may result in a discharge into waters of United States in that state, unless he determines that such conditions do not comply with the provisions of 33 CFR 325.4. In the latter case, the conditioned 401 water quality certification will be considered a denial of the certification (see paragraph (c)(3) of this section).

3. If a state denies a required 401 water quality certification for an activity otherwise meeting the terms and conditions of a particular NWP, that NWP's authorization for all such activities within that state is denied without prejudice until the state issues an individual 401 water quality certification or waives its right to do so. State denial of 401 water quality certification for any specific NWP affects only those activities which may result in a discharge. That NWP continues to authorize activities which could not reasonably be expected to result in discharges into waters of the United States.

4. DEs will take appropriate measures to inform the public of which activities, waterbodies, or regions require an individual 401 water quality certification before authorization by NWP.

5. The DE will not require or process an individual permit application for an activity which may result in a discharge and otherwise qualifies for an NWP solely on the basis that the 401 water quality certification has been denied for that NWP. However, the district or division engineer may consider water quality, among other appropriate factors, in determining whether to exercise his discretionary authority and require a regional general permit or an individual permit.

6. In instances where a state has denied the 401 water quality certification for discharges under a particular NWP, permittees must furnish the DE with an individual 401 water quality certification or a copy of the application to the state for such certification. For NWPs for which a state has denied the 401 water quality certification, the DE will determine a reasonable period of time after

receipt of the request for an activity-specific 401 water quality certification (generally 60 days), upon the expiration of which the DE will presume state waiver of the certification for the individual activity covered by the NWP's. However, the DE and the state may negotiate for additional for the 401 water quality certification, but in no event shall the period exceed one (1) year (see 33 CFR 325.2(b)(1)(ii)). Upon receipt of an individual 401 water quality certification, or if the prospective permittee demonstrates to the DE state waiver of such certification, the proposed work can be authorized under the NWP. For NWPs requiring a 30-day predischarge notification the district engineer will immediately begin, and complete, his review prior to the state action on the individual section 401 water quality certification. If a state issues a conditioned individual 401 water quality certification for an individual activity, the DE will include those conditions as activity-specific conditions of the NWP.

7. Where a state, after issuing a 401 water quality certification for an NWP, subsequently attempts to withdraw it for substantive reasons after the effective date of the NWP, the division engineer will review those reasons and consider whether there is substantial basis for suspension, modification, or revocation of the NWP authorization as outlined in Section 330.5. Otherwise, such attempted state withdrawal is not effective and the Corps will consider the state certification to be valid for the NWP authorizations until such time as the NWP is modified or reissued.

d. **Coastal zone management consistency determination.**

1. Section 307(c)(1) of the Coastal Zone Management Act (CZMA) requires the Corps to provide a consistency determination and receive state agreement prior to the issuance, reissuance, or expansion of activities authorized by an NWP that authorizes activities within a state with a Federally-approved Coastal Management Program when activities that would occur within, or outside, that state's coastal zone will affect land or water uses or natural resources of the state's coastal zone.

2. If, prior to the issuance, reissuance, or expansion of activities authorized by an NWP, a state indicates that additional conditions are necessary for the state to agree with the Corps consistency determination, the division engineer will make such conditions regional conditions for the NWP in that state, unless he determines that the conditions do not comply with the provisions of 33 CFR 325.4 or believes for some other specific reason it would be inappropriate to include the conditions. In this case, the state's failure to agree with the Corps consistency determination without the conditions will be considered to be a disagreement with the Corps consistency determination.

3. When a state has disagreed with the Corps consistency determination, authorization for all such activities occurring within or outside the state's coastal zone that affect land or water uses or natural resources of the state's coastal zone is denied without prejudice until the prospective permittee furnishes the DE an individual consistency certification pursuant to Section 307(c)(3) of the CZMA

and demonstrates that the state has concurred in it (either on an individual or generic basis), or that concurrence should be presumed (see paragraph (d)(6) of this Section).

4. DEs will take appropriate measures, such as public notices, to inform the public of which activities, waterbodies, or regions require prospective permittees to make an individual consistency determination and seek concurrence from the state.

5. DEs will not require or process an individual permit application for an activity otherwise qualifying for an NWP solely on the basis that the activity has not received CZMA consistency agreement from the state. However, the district or division engineer may consider that factor , among other appropriate factors, in determining whether to exercise his discretionary authority and require a regional general permit or an individual permit application.

6. In instances where a state has disagreed with the Corps consistency determination for activities under a particular NWP, permittees must furnish the DE with an individual consistency concurrence or a copy of the consistency certification provided to the state for concurrence. If a state fails to act on a permittee's consistency certification within six months after receipt by the state, concurrence will be presumed. Upon receipt of an individual consistency concurrence or upon presumed consistency, the proposed work is authorized if it complies with all terms and conditions of the NWP. For NWPs requiring a 30-day predischarge notification the DE will immediately begin, and may complete, his review prior to the state action on the individual consistency certification. If a state indicates that individual conditions are necessary for consistency with the state's Federally-approved coastal management program for that individual activity, the DE will include those conditions as activity-specific conditions of the NWP unless he determines that such conditions do not comply with the provisions of 33 CFR 325.4. In the latter case the DE will consider the conditioned concurrence as a nonconcurrence unless the permittee chooses to comply voluntarily with all the conditions in the conditioned concurrence.

7. Where a state, after agreeing with the Corps consistency determination, subsequently attempts to reverse it's agreement for substantive reasons after the effective date of the NWP, the division engineer will review those reasons and consider whether there is substantial basis for suspension, modification, or revocation as outlined in 33 CFR 330.5. Otherwise, such attempted reversal is not effective and the Corps will consider the state CZMA consistency agreement to be valid for the NWP authorization until such time as the NWP is modified or reissued.

8. Federal activities must be consistent with a state's Federally-approved coastal management program to the maximum extent practicable. Federal agencies should follow their own procedures and the Department of Commerce regulations appearing at 15 CFR Part 930 to meet the requirements of the CZMA. Therefore, the provisions of 33 CFR 330.4(d)(1)-(7) do not apply to Federal activities. Indian

tribes doing work on Indian Reservation lands shall be treated in the same manner as Federal applicants.

e. **Discretionary authority.** The Corps reserves the right (i.e., discretion) to modify, suspend, or revoke NWP authorizations. Modification means the imposition of additional or revised terms or conditions on the authorization. Suspension means the temporary cancellation of the authorization while a decision is made to either modify, revoke, or reinstate the authorization. Revocation means the cancellation of the authorization. The procedures for modifying, suspending, or revoking NWP authorizations are detailed in Section 330.5.

1. A division engineer may assert discretionary authority by modifying, suspending, or revoking NWP authorizations for a specific geographic area, class of activity, or class of waters within his division, including on a statewide basis, whenever he determines sufficient concerns for the environment under the Section 404(b)(1) Guidelines or any other factor of the public interest so requires, or if he otherwise determines that the NWP would result in more than minimal adverse environmental effects either individually or cumulatively.

2. A DE may assert discretionary authority by modifying, suspending, or revoking NWP authorization for a specific activity whenever he determines sufficient concerns for the environment or any other factor of the public interest so requires. Whenever the DE determines that a proposed specific activity covered by an NWP would have more than minimal individual or cumulative adverse effects on the environment or otherwise may be contrary to the public interest, he must either modify the NWP authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the proposed activity is not authorized by NWP and provide instructions on how to seek authorization under a regional general or individual permit.

3. The division or district engineer will restore authorization under the NWPs at any time he determines that his reason for asserting discretionary authority has been satisfied by a condition, project modification, or new information.

4. When the Chief of Engineers modifies or reissues an NWP, division engineers must use the procedures of Section 330.5 to reassert discretionary authority to reinstate regional conditions or revocation of NWP authorizations for specific geographic areas, class of activities, or class of waters. Division engineers will update existing documentation for each NWP. Upon modification or reissuance of NWPs, previous activity-specific conditions or revocations of NWP authorization will remain in effect unless the DE specifically removes the activity-specific conditions or revocations.

f. **Endangered Species.** No activity is authorized by any NWP if that activity is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the Federal Endangered Species Act (ESA), or to destroy or adversely modify the critical habitat of such species.

1. Federal agencies should follow their own procedures for complying with the requirements of the ESA.

2. Non-federal permittees shall notify the DE if any Federally listed (or proposed for listing) endangered or threatened species or critical habitat might be affected or is in the vicinity of the project. In such cases, the prospective permittee will not begin work under authority of the NWP until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. If the DE determines that the activity may affect any Federally listed species or critical habitat, the DE must initiate Section 7 consultation in accordance with the ESA. In such cases, the DE may:

    i. Initiate Section 7 consultation and then, upon completion, authorize the activity under the NWP by adding, if appropriate, activity-specific conditions; or

    ii. Prior to or concurrent with Section 7 consultation, assert discretionary authority (see 33 CFR 330.4(e)) and require an individual permit (see 33 CFR 330.5(d)).

3. Prospective permittees are encouraged to obtain information on the location of threatened or endangered species and their critical habitats from the U.S. Fish and Wildlife Service, Endangered Species Office, and the National Marine Fisheries Service.

g. **Historic Properties.** No activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places, is authorized until the DE has complied with the provisions of 33 CFR Part 325, Appendix C.

1. Federal permittees should follow their own procedures for compliance with the requirements of the National Historic Preservation Act and other Federal historic preservation laws.

2. Non-federal permittees will notify the DE if the activity may affect historic properties which the National Park Service has listed, determined eligible for listing, or which the prospective permittee has reason to believe may be eligible for listing, on the National Register of Historic Places. In such cases, the prospective permittee will not begin the proposed activity until notified by the DE that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. If a property in the permit area of the activity is determined to be an historic property in accordance with 33 CFR Part 325, Appendix C, the DE will take into account the effects on such properties in accordance with 33 CFR Part 325, Appendix C. In such cases, the district engineer may:

    i. After complying with the requirements of 33 CFR Part 325, Appendix C, authorize the activity under the NWP by adding, if appropriate, activity-specific conditions; or

ii. Prior to or concurrent with complying with the requirements of 33 CFR Part 325, Appendix C, he may assert discretionary authority (see 33 CFR 330.4(e)) and instruct the prospective permittee of procedures to seek authorization under a regional general permit or an individual permit. (See 33 CFR 330.5(d)).

3. The permittee shall immediately notify the DE if, before or during prosecution of the work authorized, he encounters an historic property that has not been listed or determined eligible for listing on the National Register, but which the prospective permittee has reason to believe may be eligible for listing on the National Register.

4. Prospective permittees are encouraged to obtain information on the location of historic properties from the State Historic Preservation Officer and the National Register of Historic Places.

Sec. 330.5 Issuing, modifying, suspending, or revoking nationwide permits and authorizations.

a. **General.** This section sets forth the procedures for issuing and reissuing NWPs and for modifying, suspending, or revoking NWPs and authorizations under NWPs.

b. **Chief of Engineers.**

1. Anyone may, at any time, suggest to the Chief of Engineers, (ATTN: CECW-OR), any new NWPs or conditions for issuance, or changes to existing NWPs, which he believes to be appropriate for consideration. From time-to-time new NWPs and revocations of or modifications to existing NWPs will be evaluated by the Chief of Engineers following the procedures specified in this section. Within five years of issuance of the NWPs, the Chief of Engineers will review the NWPs and propose modification, revocation, or reissuance.

2. Public Notice.

i. Upon proposed issuance of new NWPs or modification, suspension, revocation, or reissuance of existing NWPs, the Chief of Engineers will publish a document seeking public comments, including the opportunity to request a public hearing. This document will also state that the information supporting the Corps' provisional determination that proposed activities comply with the requirements for issuance under general permit authority is available at the Office of the Chief of Engineers and at all district offices. The Chief of Engineers will prepare this information which will be supplemented, if appropriate, by division engineers.

ii. Concurrent with the Chief of Engineers' notification of proposed, modified, reissued, or revoked NWPs, DEs will notify the known interested public by a notice issued at the district level. The notice will

include proposed regional conditions or proposed revocations of NWP authorizations for specific geographic areas, classes of activities, or classes of waters, if any, developed by the division engineer.

3. Documentation. The Chief of Engineers will prepare appropriate NEPA documents and, if applicable, Section 404(b)(1) Guidelines compliance analyses for proposed NWPs. Documentation for existing NWPs will be modified to reflect any changes in these permits and to reflect the Chief of Engineers' evaluation of the use of the permit since the last issuance. Copies of all comments received on the document will be included in the administrative record. The Chief of Engineers will consider these comments in making his decision on the NWPs, and will prepare a statement of findings outlining his views regarding each NWP and discussing how substantive comments were considered. The Chief of Engineers will also determine the need to hold a public hearing for the proposed NWPs.

4. Effective Dates. The Chief of Engineers will advise the public of the effective date of any issuance, modification, or revocation of an NWP.

c. **Division Engineer.**

1. A division engineer may use his discretionary authority to modify, suspend, or revoke NWP authorizations for any specific geographic area, class of activities, or class of waters within his division, including on a statewide basis, by issuing a public notice or notifying the individuals involved. The notice will state his concerns regarding the environment or the other relevant factors of the public interest. Before using his discretionary authority to modify or revoke such NWP authorizations, division engineers will:

i. Give an opportunity for interested parties to express their views on the proposed action (the DE will publish and circulate a notice to the known interested public to solicit comments and provide the opportunity to request a public hearing);

ii. Consider fully the views of affected parties;

iii. Prepare supplemental documentation for any modifications or revocations that may result through assertion of discretionary authority. Such documentation will include comments received on the district public notices and a statement of findings showing how substantive comments were considered;

iv. Provide, if appropriate, a grandfathering period as specified in Section 330.6(b) for those who have commenced work or are under contract to commence in reliance on the NWP authorization; and

v. Notify affected parties of the modification, suspension, or revocation, including the effective date (the DE will publish and circulate a notice to the known interested public and to anyone who commented on the proposed action).

2. The modification, suspension, or revocation of authorizations under an NWP by the division engineer will become effective by issuance of public notice or a notification to the individuals involved.

3. A copy of all regional conditions imposed by division engineers on activities authorized by NWPs will be forwarded to the Office of the Chief of Engineers, ATTN: CECW-OR.

d. **District Engineer.**

1. When deciding whether to exercise his discretionary authority to modify, suspend, or revoke a case specific activity's authorization under an NWP, the DE should consider to the extent relevant and appropriate: changes in circumstances relating to the authorized activity since the NWP itself was issued or since the DE confirmed authorization under the NWP by written verification; the continuing need for, or adequacy of, the specific conditions of the authorization; any significant objections to the authorization not previously considered; progress inspections of individual activities occurring under an NWP; cumulative adverse environmental effects resulting from activities occurring under the NWP; the extent of the permittee's compliance with the terms and conditions of the NWPs; revisions to applicable statutory or regulatory authorities; and, the extent to which asserting discretionary authority would adversely affect plans, investments, and actions the permittee has made or taken in reliance on the permit; and, other concerns for the environment, including the aquatic environment under the Section 404(b)(1) Guidelines, and other relevant factors of the public interest.

2. Procedures.

i. When considering whether to modify or revoke a specific authorization under an NWP, whenever practicable, the DE will initially hold informal consultations with the permittee to determine whether special conditions to modify the authorization would be mutually agreeable or to allow the permittee to furnish information which satisfies the DE's concerns. If a mutual agreement is reached, the DE will give the permittee written verification of the authorization, including the special conditions. If the permittee furnishes information which satisfies the DE's concerns, the permittee may proceed. If appropriate, the DE may suspend the NWP authorization while holding informal consultations with the permittee.

ii. If the DE's concerns remain after the informal consultation, the DE may suspend a specific authorization under an NWP by notifying the permittee in writing by the most expeditious means available that the authorization has been suspended, stating the reasons for the suspension, and ordering the permittee to stop any activities being done in reliance upon the authorization under the NWP. The permittee will be advised that a decision will be made either to reinstate or revoke the authorization under the NWP; or, if appropriate, that the authorization under the NWP may be modified by mutual agreement. The permittee will also be advised that

within 10 days of receipt of the notice of suspension, he may request a meeting with the DE, or his designated representative, to present information in this matter. After completion of the meeting (or within a reasonable period of time after suspending the authorization if no meeting is requested), the DE will take action to reinstate, modify, or revoke the authorization.

iii. Following completion of the suspension procedures, if the DE determines that sufficient concerns for the environment, including the aquatic environment under the Section 404(b)(1) Guidelines, or other relevant factors of the public interest so require, he will revoke authorization under the NWP. The DE will provide the permittee a written final decision and instruct him on the procedures to seek authorization under a regional general permit or an individual permit.

3. The DE need not issue a public notice when asserting discretionary authority over a specific activity. The modification, suspension, or revocation will become effective by notification to the prospective permittee.

Sec 330.6 Authorization by nationwide permit.

a. **Nationwide permit verification.**

1. Nationwide permittees may, and in some cases must, request from a DE confirmation that an activity complies with the terms and conditions of an NWP. DEs should respond as promptly as practicable to such requests.

2. If the DE decides that an activity does not comply with the terms or conditions of an NWP, he will notify the person desiring to do the work and instruct him on the procedures to seek authorization under a regional general permit or individual permit.

3. If the DE decides that an activity does comply with the terms and conditions of an NWP, he will notify the nationwide permittee.

i. The DE may add conditions on a case-by-case basis to clarify compliance with the terms and conditions of an NWP or to ensure that the activity will have only minimal individual and cumulative adverse effects on the environment, and will not be contrary to the public interest.

ii. The DE's response will state that the verification is valid for a specific period of time (generally but no more than two years) unless the NWP authorization is modified, suspended, or revoked. The response should also include a statement that the verification will remain valid for the specified period of time, if during that time period, the NWP authorization is reissued without modification or the activity complies with any subsequent modification of the NWP authorization. Furthermore, the

response should include a statement that the provisions of 330.6(b) will apply, if during that period of time, the NWP authorization expires, or is suspended or revoked, or is modified, such that the activity would no longer comply with the terms and conditions of an NWP. Finally, the response should include any known expiration date that would occur during the specified period of time. A period of time less than two years may be used if deemed appropriate.

iii. For activities where a state has denied 401 water quality certification and/or did not agree with the Corps consistency determination for an NWP the DE's response will state that the proposed activity meets the terms and conditions for authorization under the NWP with the exception of a state 401 water quality certification and/or CZM consistency concurrence. The response will also indicate the activity is denied without prejudice and cannot be authorized until the requirements of Sections 330.4(c)(3), 330.4(c)(6), 330.4(d)(3), and 330.4(d)(6) are satisfied. The response will also indicate that work may only proceed subject to the terms and conditions of the state 401 water quality certification and/or CZM concurrence.

iv. Once the DE has provided such verification, he must use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the authorization.

4. Expiration of nationwide permits. The Chief of Engineers will periodically review NWPs and their conditions and will decide to either modify, reissue, or revoke the permits. If an NWP is not modified or reissued within five years of its effective date, it automatically expires and becomes null and void. Activities which have commenced (i.e, are under construction) or are under contract to commence in reliance upon an NWP will remain authorized provided the activity is completed within twelve months of the date of an NWP's expiration, modification, or revocation, unless discretionary authority has been exercised on a case-by- case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5(c) or (d). Activities completed under the authorization of an NWP which was in effect at the time the activity was completed continue to be authorized by that NWP.

b. **Multiple use of nationwide permits.** Two or more different NWPs can be combined to authorize a "single and complete project" as defined at 33 CFR 330.2(i). However, the same NWP cannot be used more than once for a single and complete project.

c. **Combining nationwide permits with individual permits.** Subject to the following qualifications, portions of a larger project may proceed under the authority of the NWPs while the DE evaluates an individual permit application for other portions of the same project, but only if the portions of the project qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project. When the functioning or usefulness of a portion of the total project qualifying for an NWP is dependent on the remainder of the project, such that its construction and use would not be fully justified even if the Corps were to deny the

individual permit, the NWP does not apply and all portions of the project must be evaluated as part of the individual permit process.

1. When a portion of a larger project is authorized to proceed under an NWP, it is with the understanding that its construction will in no way prejudice the decision on the individual permit for the rest of the project. Furthermore, the individual permit documentation must include an analysis of the impacts of the entire project, including related activities authorized by NWP.

2. NWPs do not apply, even if a portion of the project is not dependent on the rest of the project, when any portion of the project is subject to an enforcement action by the Corps or EPA.

d. **After-the-fact authorizations.** These authorizations often play an important part in the resolution of violations. In appropriate cases where the activity complies with the terms and conditions of an NWP, the DE can elect to use the NWP for resolution of an after-the-fact permit situation following a consideration of whether the violation being resolved was knowing or intentional and other indications of the need for a penalty. For example, where an unauthorized fill meets the terms and conditions of NWP 13, the DE can consider the appropriateness of allowing the residual fill to remain, in situations where said fill would normally have been permitted under NWP 13. A knowing, intentional, willful violation should be the subject of an enforcement action leading to a penalty, rather than an after-the- fact authorization. Use of after-the-fact NWP authorization must be consistent with the terms of the Army/EPA Memorandum of Agreement on Enforcement. Copies are available from each district engineer.

Appendix to Part 330
Nationwide Permits and Conditions

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APPENDIX B - NATIONWIDE PERMITS:

1. **Aids to Navigation.** The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard. (See 33 CFR Part 66, Chapter I, Subchapter C). (Section 10)

2. **Structures in Artificial Canals.** Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Section 10)

3. **Maintenance.** The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement are permitted, provided the environmental impacts resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This nationwide permit authorizes the repair, rehabilitation, or replacement of those structures destroyed by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced or under contract to commence within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornados, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays. Maintenance dredging and beach restoration are not authorized by this nationwide permit. (Sections 10 and 404)

4. **Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.** Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, clam and oyster digging; and small fish attraction devices such as open water fish concentrators (sea kites, etc). This nationwide permit authorizes shellfish seeding provided this activity does not occur in wetlands or vegetated shallows. This nationwide permit does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster. (Sections 10 and 404)

5. **Scientific Measurement Devices.** Staff gages, tide gages, water recording devices, water quality testing and improvement devices and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards and further for discharges of 10 to 25 cubic yards provided the permittee notifies the district engineer in accordance with "Notification" general condition. (Sections 10 and 404)

6. **Survey Activities.** Survey activities including core sampling, seismic exploratory operations, and plugging of seismic shot holes and other exploratory-type bore holes. Drilling and the discharge of excavated material from test wells for oil and gas exploration is not authorized by this nationwide permit; the plugging of such wells is authorized. Fill placed for roads, pads and other similar activities is not authorized by this nationwide permit. The discharge of drilling muds and cuttings may require a permit under Section 402 of the Clean Water Act. (Sections 10 and 404)

7. **Outfall Structures.** Activities related to construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act), provided that the nationwide permittee notifies the district engineer in accordance with the "Notification" general condition. (Also see 33 CFR 330.1(e)). Intake structures *perse* are not included - only those directly associated with an outfall structure. (Sections 10 and 404)

8. **Oil and Gas Structures.** Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Minerals Management Service. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). (Where such limits have not been designated, or where changes are anticipated, district engineers will consider asserting discretionary authority in accordance with 33 CFR 330.4(e) and will also review such proposals to ensure they

comply with the provisions of the fairway regulations in 33 CFR 322.5(1)). Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR Part 334: nor will such structures be permitted in EPA or Corps designated dredged material disposal areas. (Section 10)

9. **Structures in Fleeting and Anchorage Areas.** Structures, buoys, floats, and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established for that purpose by the U.S. Coast Guard. (Section 10)

10. **Mooring Buoys.** Non-commercial, single-boat, mooring buoys. (Section 10)

11. **Temporary Recreational Structures.** Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 10)

12. **Utility Line Backfill and Bedding.** Discharges of material for backfill or bedding for utility lines, including outfall and intake structures, provided there is no change in preconstruction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. The term "utility line" does not include activities which drain a water of the United States, such as drainage tile, however, it does apply to pipes conveying drainage from another area. Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The DE may extend the period of temporary side-casting up to 180 days, where appropriate. The area of waters of the United States that is disturbed must be limited to the minimum necessary to construct the utility line. In wetlands, the top 6" to 12" of the trench should generally be backfilled with topsoil from the trench. Excess material must be removed to upland areas immediately upon completion of construction. Any exposed slopes and streambanks must be stabilized immediately upon completion of the utility line. The utility line itself will require a Section 10 permit if in navigable waters of the United States. (See 33 CFR Part 322). (Section 404)

13. **Bank Stabilization.** Bank stabilization activities necessary for erosion prevention

provided:

a. No material is placed in excess of the minimum needed for erosion protection;

b. The bank stabilization activity is less than 500 feet in length;

c. The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line;

d. No material is placed in any special aquatic site, including wetlands;

e. No material is of the type or is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;

f. No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and treetops may be used in low energy areas); and,

g. The activity is part of a single and complete project.

Bank stabilization activities in excess of 500 feet in length or greater than an average of one cubic yard per running foot may be authorized if the permittee notifies the district engineer in accordance with the "Notification" general condition and the district engineer determines the activity complies with the other terms and conditions of the nationwide permit and the adverse environmental impacts are minimal both individually and cumulatively. (Sections 10 and 404)

14. **Road Crossing.** Fills for roads crossing waters of the United States (including wetlands and other special aquatic sites) provided:

a. The width of the fill is limited to the minimum necessary for the actual crossing;

b. The fill placed in waters of the United States is limited to a filled area of no more than 1/3 acre. Furthermore, no more than a total of 200 linear feet of the fill for the roadway can occur in special aquatic sites, including wetlands;

c. The crossing is culverted, bridged or otherwise designed to prevent the restriction of, and to withstand, expected high flows and tidal flows, and to prevent the restriction of low flows and the movement of aquatic organisms;

d. The crossing, including all attendant features, both temporary and permanent, is part of a single and complete project for crossing of a water of the United States; and,

e. For fills in special aquatic sites, including wetlands, the permittee notifies the district engineer in accordance with the "Notification" general condition. The notification must also include a delineation of affected special aquatic sites, including wetlands.

Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4). Also, where local circumstances indicate the need, district engineers will define the term "expected high flows" for the purpose of establishing applicability of this nationwide permit. (Sections 10 and 404)

15. **U.S. Coast Guard Approved Bridges.** Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such discharges have been authorized by the U.S. Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this nationwide permit and will require an individual or regional Section 404 permit. (Section 404)

16. **Return Water From Upland Contained Disposal Areas.** Return water from an upland, contained dredged material disposal area. The dredging itself requires a Section 10 permit if located in navigable waters of the United States. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d) even though the disposal itself occurs on the upland and thus does not require a Section 404 permit. This nationwide permit satisfies the technical requirement for a Section 404 permit for the return water where the quality of the return water is controlled by the state through the Section 401 certification procedures. (Section 404)

17. **Hydropower Projects.** Discharges of dredged or fill material associated with (a) small hydropower projects at existing reservoirs where the project, which includes the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; and has a total generating capacity of not more than 5000 KW; and the permittee notifies the district engineer in accordance with the "Notification" general condition; or (b) hydropower projects for which the FERC has granted an exemption from licensing pursuant to Section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and Section 30 of the Federal Power Act, as amended; provided the permittee notifies the district engineer in accordance with the "Notification" general condition. (Section 404)

18. **Minor Discharges.** Minor discharges of dredged or fill material into all waters of the United States provided:

    a. The discharge does not exceed 25 cubic yards;

    b. The discharge will not cause the loss of more than 1/10 acre of a special aquatic site, including wetlands. For the purposes of this nationwide permit, the acreage limitation includes the filled area plus special aquatic sites that are adversely affected by flooding and special aquatic sites that are drained so that they would

no longer be a water of the United States as a result of the project;

c. If the discharge exceeds 10 cubic yards or the discharge is in a special aquatic site, including wetlands, the permittee notifies the district engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)); and

d. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project and is not placed for the purpose of stream diversion. (Sections 10 and 404)

19. **Minor Dredging.** Dredging of *no more than 25 cubic yards* below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States as part of a single and complete project. This nationwide permit does not authorize the dredging or degradation through siltation of coral reefs, submerged aquatic vegetation, anadromous fish spawning areas, or wetlands or, the connection of canals or other artificial waterways to navigable waters of the United States (see Section 33 CFR 322.5(g)). (Section 10)

20. **Oil Spill Cleanup.** Activities required for the containment and cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan, (40 CFR Part 300), provided that the work is done in accordance with the Spill Control and Countermeasure Plan required by 40 CFR 112.3 and any existing State contingency plan and provided that the Regional Response Team (if one exists in the area) concurs with the proposed containment and cleanup action. (Sections 10 and 404)

21. **Surface Coal Mining Activities.** Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the district engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)). (Sections 10 and 404)

22. **Removal of Vessels.** Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This nationwide permit does not authorize the removal of vessels listed or determined eligible for listing on the National

Register of Historic Places unless the district engineer is notified and indicates that there is compliance with the "Historic Properties" general condition. This nationwide permit does not authorize maintenance dredging, shoal removal, or river bank snagging. Vessel disposal in waters of the United States may need a permit from EPA (see 40 CFR 229.3). (Sections 10 and 404)

23. **Approved Categorical Exclusions.** Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where that agency or department has determined, pursuant to the Council on Environmental Quality Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1500 et seq.), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and the Office of the Chief of Engineers (ATTN: CECW-OR) has been furnished notice of the agency's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this nationwide permit of any agency's categorical exclusions, the Chief of Engineers will solicit public comment. In addressing these comments, the Chief of Engineers may require certain conditions for authorization of an agency's categorical exclusions under this nationwide permit. (Sections 10 and 404)

24. **State Administered Section 404 Program.** Any activity permitted by a state administering its own Section 404 permit program pursuant to 33 U.S.C. 1344(g)-(l) is permitted pursuant to Section 10 of the Rivers and Harbors Act of 1899. Those activities which do not involve a Section 404 state permit are not included in this nationwide permit, but certain structures will be exempted by Sec. 154 of PL 94-587, 90 Stat. 2917 (33 U.S.C. 59l) (see 33 CFR 322.3(a)(2)). (Section 10)

25. **Structural Discharge.** Discharges of material such as concrete, sand, rock, etc. into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as piers and docks; and for linear projects, such as bridges, transmission line footings, and walkways. The NWP does not authorize filled structural members that would support buildings, homes, parking areas, storage areas and other such structures. Housepads or other building pads are also not included in this nationwide permit. The structure itself may require a Section 10 permit if located in navigable waters of the United States. (Section 404)

26. **Headwaters and Isolated Waters Discharges.** Discharges of dredged or fill material into headwaters and isolated waters provided:

    a. The discharge does not cause the loss of more than 10 acres of waters of the

United States;

b. The permittee notifies the district engineer if the discharge would cause the loss of waters of the United States greater than one acre in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)); and

c. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project.

For the purposes of this nationwide permit, the acreage of loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding, excavation or drainage as a result of the project. The ten-acre and one-acre limits of NWP 26 are absolute, and cannot be increased by any mitigation plan offered by the applicant or required by the DE.

Subdivisions: For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to subsection (b) of this nationwide permit is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed one (1) acre. Any discharge in any real estate subdivision which would cause the aggregate total loss of waters of the United States in the subdivision to exceed ten (10) acres is not authorized by this nationwide permit; unless the DE exempts a particular subdivision or parcel by making a written determination that:

1. the individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to [Insert date, 60 days from date of publication in the Federal Register], committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate his investment-backed expectations, or

2. that the individual and cumulative adverse environmental effects would be minimal, high quality wetlands would not be adversely affected, and there would be an overall benefit to the aquatic environment. Once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 26. For purposes of NWP 26, the term "real estate subdivision" shall be interpreted to include circumstances where a landowner or developer divides a tract of land into smaller parcels for the purpose of selling, conveying, transferring, leasing, or developing said parcels. This would include the entire area of a residential, commercial or other real estate subdivision, including all parcels and parts thereof. (Section 404)

27. **Wetland and Riparian Restoration and Creation Activities.** Activities in waters of the United States associated with the restoration of altered and degraded non-tidal wetlands and creation of wetlands on private lands in accordance with the terms and conditions of a binding wetland restoration or creation agreement between the landowner and the U.S.

Fish and Wildlife Service (USFWS) or the Soil Conservation Service (SCS); or activities associated with the restoration of altered and degraded non-tidal wetlands, riparian areas and creation of wetlands and riparian areas on U.S. Forest Service and Bureau of Land Management lands, Federal surplus lands (e.g., military lands proposed for disposal), Farmers Home Administration inventory properties, and Resolution Trust Corporation inventory properties that are under Federal control prior to being transferred to the private sector. Such activities include, but are not limited to: Installation and maintenance of small water control structures, dikes, and berms; backfilling of existing drainage ditches; removal of existing drainage structures; construction of small nesting islands; and other related activities. This nationwide permit applies to restoration projects that serve the purpose of restoring "natural" wetland hydrology, vegetation, and function to altered and degraded non-tidal wetlands and "natural" functions of riparian areas. For agreement restoration and creation projects only, this nationwide permit also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its prior condition and use (i.e., prior to restoration under the agreement) within five years after expiration of the limited term wetland restoration or creation agreement, even if the discharge occurs after this nationwide permit expires. The prior condition will be documented in the original agreement, and the determination of return to prior conditions will be made by the Federal agency executing the agreement. Once an area is reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. This nationwide permit does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. (Sections 10 and 404)

28. **Modifications of Existing Marinas.** Reconfigurations of existing docking facilities within an authorized marina area. No dredging, additional slips or dock spaces, or expansion of any kind within waters of the United States are authorized by this nationwide permit. (Section 10)

29. **RESERVED**

30. **RESERVED**

31. **RESERVED**

32. **Completed Enforcement Actions.** Any structure, work or discharge of dredged or fill material undertaken in accordance with, or remaining in place in compliance with, the terms of a final Federal court decision, consent decree, or settlement agreement in an enforcement action brought by the United States under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. (Sections 10 and 404)

33. **Temporary Construction, Access and Dewatering.** Temporary structures and discharges, including cofferdams, necessary for construction activities or access fills or

dewatering of construction sites; provided the associated permanent activity was previously authorized by the Corps of Engineers or the U.S. Coast Guard, or for bridge construction activities not subject to Federal regulation. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must be of materials and placed in a manner that will not be eroded by expected high flows. Temporary fill must be entirely removed to upland areas following completion of the construction activity and the affected areas restored to the pre-project conditions. Cofferdams cannot be used to dewater wetlands or other aquatic areas so as to change their use. Structures left in place after cofferdams are removed require a Section 10 permit if located in navigable waters of the United States. (See 33 CFR Part 322). The permittee must notify the district engineer in accordance with the "Notification" general condition. The notification must also include a restoration plan of reasonable measures to avoid and minimize impacts to aquatic resources. The district engineer will add special conditions, where necessary, to ensure that adverse environmental impacts are minimal. Such conditions may include: limiting the temporary work to the minimum necessary; requiring seasonal restrictions; modifying the restoration plan; and requiring alternative construction methods (e.g. construction mats in wetlands where practicable). This nationwide permit does not authorize temporary structures or fill associated with mining activities or the construction of marina basins which have not been authorized by the Corps. (Sections 10 and 404)

34. **CRANBERRY PRODUCTION ACTIVITIES:** Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations provided:

    a. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, does not exceed 10 acres of waters of the United States, including wetlands;

    b. The permittee notifies the District Engineer in accordance with the notification procedures; and

    c. The activity does not result in a net loss of wetland acreage.

    This nationwide permit does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities , or parking areas. For the purposes of this nationwide permit, the cumulative total of 10 acres will be measured over the period that this nationwide permit is valid. (Section 404)

35. **Maintenance Dredging of Existing Basins.** Excavation and removal of accumulated sediment for maintenance of existing marina basins, canals, and boat slips to previously authorized depths or controlling depths for ingress/egress whichever is less provided the dredged material is disposed of at an upland site and proper siltation controls are used. (Section 10)

36. **Boat Ramps.** Activities required for the construction of boat ramps provided:

    a. The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or placement of pre-cast concrete planks or slabs. (Unsuitable material that causes unacceptable chemical pollution or is structurally unstable is not authorized);

    b. The boat ramp does not exceed 20 feet in width;

    c. The base material is crushed stone, gravel or other suitable material;

    d. The excavation is limited to the area necessary for site preparation and all excavated material is removed to the upland; and

    e. No material is placed in special aquatic sites, including wetlands.

    Dredging to provide access to the boat ramp may be authorized by another NWP, regional general permit, or individual permit pursuant to Section 10 if located in navigable waters of the United States. (Sections 10 and 404)

37. **Emergency Watershed Protection and Rehabilitation.** Work done by or funded by the Soil Conservation Service qualifying as an "exigency" situation (requiring immediate action) under its Emergency Watershed Protection Program (7 CFR Part 624) and work done or funded by the Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13) provided the district engineer is notified in accordance with the notification general condition. (Also see 33 CFR 330.1(e)). (Sections 10 and 404)

38. **Cleanup of Hazardous and Toxic Waste.** Specific activities required to effect the containment, stabilization or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority provided the permittee notifies the district engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. Court ordered remedial action plans or related settlements are also authorized by this nationwide permit. This nationwide permit does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste. (Sections 10 and 404)

39. **RESERVED**

40. **Farm Buildings.** Discharges of dredged or fill material into jurisdictional wetlands (but not including prairie potholes, playa lakes, or vernal pools) that were in agricultural crop

production prior to December 23, 1985 (i.e., farmed wetlands) for foundations and building pads for buildings or agricultural related structures necessary for farming activities. The discharge will be limited to the minimum necessary but will in no case exceed 1 acre (see the "Minimization" Section 404 only condition). (Section 404)

APPENDIX C - NATIONWIDE PERMIT CONDITIONS

GENERAL CONDITIONS: The following general conditions must be followed in order for any authorization by a nationwide permit to be valid:

1. **Navigation.** No activity may cause more than a minimal adverse effect on navigation.

2. **Proper maintenance.** Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

3. **Erosion and siltation controls.** Appropriate erosion and siltation controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills must be permanently stabilized at the earliest practicable date.

4. **Aquatic life movements.** No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water.

5. **Equipment.** Heavy equipment working in wetlands must be placed on mats or other measures must be taken to minimize soil disturbance.

6. **Regional and case-by-case conditions.** The activity must comply with any regional conditions which may have been added by the division engineer (see 33 CFR 330.4(e)) and any case specific conditions added by the Corps.

7. **Wild and Scenic Rivers.** No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status. Information on Wild and Scenic Rivers may be obtained from the National Park Service and the U.S. Forest Service.

8. **Tribal rights.** No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

9. **Water quality certification.** In certain states, an individual state water quality certification must be obtained or waived (see 33 CFR 330.4(c)).

10. **Coastal zone management.** In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived. (see 33 CFR 330.4(d)).

11. **Endangered Species.** No activity is authorized under any NWP which is likely to

jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the district engineer if any listed species or critical habitat might be affected or is in the vicinity of the project and shall not begin work on the activity until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. Information on the location of threatened and endangered species and their critical habitat can be obtained from the U.S. Fish and Wildlife Service and National Marine Fisheries Service. (see 33 CFR 330.4(f))

12. **Historic properties.** No activity which may affect Historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR 325, Appendix C. The prospective permittee must notify the district engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)).

13. **Notification.**

    a. Where required by the terms of the NWP, the prospective permittee must notify the District Engineer as early as possible and shall not begin the activity:

        1. Until notified by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

        2. If notified by the District or Division engineer that an individual permit is required; or

        3. Unless 30 days have passed from the District Engineer's receipt of the notification and the prospective permittee has not received notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

    b. The notification must be in writing and include the following information and any required fees:

        1. Name, address and telephone number of the prospective permittee;

        2. Location of the proposed project;

        3. Brief description of the proposed project; the project's purpose; direct and

indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s) or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity;

4. Where required by the terms of the NWP, a delineation of affected special aquatic sites, including wetlands; and

5. A statement that the prospective permittee has contacted:

i. The USFWS/NMFS regarding the presence of any Federally listed (or proposed for listing) endangered or threatened species or critical habitat in the permit area that may be affected by the proposed project; and any available information provided by those agencies. (The prospective permittee may contact Corps District Offices for USFWS/NMFS agency contacts and lists of critical habitat.)

ii. The SHPO regarding the presence of any historic properties in the permit area that may be affected by the proposed project; and the available information, if any, provided by that agency.

c. The standard individual permit application form (Form ENG 4345) may by used as the notification but must clearly indicate that it is a PDN and must include all of the information required in (b)(1)-(5) of General Condition 13.

d. In reviewing an activity under the notification procedure, the District Engineer will first determine whether the activity will result in more than minimal individual or cumulative adverse environmental effects or will be contrary to the public interest. The prospective permittee may, at his option, submit a proposed mitigation plan with the predischarge notification to expedite the process and the District Engineer will consider any optional mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed work are minimal. The District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the nationwide permits and the need for mitigation to reduce the project's adverse environmental effects to a minimal level. The district engineer will upon receipt of a notification provide immediately (e.g. facsimile transmission, overnight mail or other expeditious manner) a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 5 calendar days from the date the material is transmitted to telephone the District Engineer if they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 10 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. The District Engineer will indicate in the

administrative record associated with each notification that the resource agencies' concerns were considered. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects are minimal, he will notify the permittee and include any conditions he deems necessary. If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either:

1. that the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; or

2. that the project is authorized under the nationwide permit subject to the applicant's submitting a mitigation proposal that would reduce the adverse effects to the minimal level. This mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee elects to submit a mitigation plan, the DE will expeditiously review the proposed mitigation plan, but will not commence a second 30-day notification procedure. If the net adverse effects of the project (with the mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant informing him that the project can proceed under the terms and conditions of the nationwide permit.

e. **Wetlands Delineations:** Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 30-day period will not start until the wetland delineation has been completed.

f. **Mitigation:** Factors that the District Engineer will consider when determining the acceptability of appropriate and practicable mitigation include, but are not limited to:

1. To be practicable the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of overall project purposes;

2. To the extent appropriate, permittees should consider mitigation banking and other forms of mitigation including contributions to wetland trust funds, which contribute to the restoration, creation, replacement, enhancement, or preservation of wetlands.

Furthermore, examples of mitigation that may be appropriate and practicable include but are not limited to: reducing the size of the project; establishing buffer zones to protect aquatic resource values; and replacing the loss of aquatic resource values by creating, restoring, and enhancing similar functions and values. In

addition, mitigation must address impacts and cannot be used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the nationwide permits (e.g. 5 acres of wetlands cannot be created to change a 6 acre loss of wetlands to a 1 acre loss; however, the 5 created acres can be used to reduce the impacts of the 6 acre loss).

SECTION 404 **ONLY CONDITIONS:** In addition to the General Conditions, the following conditions apply only to activities that involve the discharge of dredged or fill material and must be followed in order for authorization by the nationwide permits to be valid:

1. **Water supply intakes.** No discharge of dredged or fill material may occur in the proximity of a public water supply intake except where the discharge is for repair of the public water supply intake structures or adjacent bank stabilization.

2. **Shellfish production.** No discharge of dredged or fill material may occur in areas of concentrated shellfish production, unless the discharge is directly related to a shellfish harvesting activity authorized by nationwide permit 4.

3. **Suitable material.** No discharge of dredged or fill material may consist of unsuitable material (e.g., trash, debris, car bodies, etc.) and material discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

4. **Mitigation.** Discharges of dredged or fill material into waters of the United States must be minimized or avoided to the maximum extent practicable at the project site (i.e. on-site), unless the DE has approved a compensation mitigation plan for the specific regulated activity.

5. **Spawning areas.** Discharges in spawning areas during spawning seasons must be avoided to the maximum extent practicable.

6. **Obstruction of high flows.** To the maximum extent practicable, discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).

7. **Adverse impacts from impoundments.** If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.

8. **Waterfowl breeding areas.** Discharges into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

9. **Removal of temporary fills.** Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

Friday
December 13, 1996

Part VII

Department of Defense

Department of the Army

Corps of Engineers

Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits; Notice

DEPARTMENT OF DEFENSE

Department of the Army

Corps of Engineers

Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits

AGENCY: Army Corps of Engineers, DOD.

ACTION: Final Notification.

SUMMARY: The Corps of Engineers is reissuing the existing nationwide permits (NWP) and conditions, some with modifications, and issuing two new NWPs. As with all general permits, NWPs include specific project limitations which ensure that adverse effects will be no more than minimal and that the aquatic environment will be protected. At the same time, if a permit applicant can design a project in a way that meets the limitations of the NWP, the Corps will provide an expedited review and decision for the project. General permits, including NWPs, are an essential part of the Corps regulatory program, and provide us with the method we use to authorize 80% of the activities we regulate. An effective NWP program is essential to administration of the Corps regulatory program. The Corps, however, is increasingly aware of the concerns regarding the level of adverse effects being authorized by NWPs, particularly NWP 26. As a result, we have taken a critical look at the NWP program to better ensure that projects that truly have minimal impacts will continue to be authorized, while ensuring that only minimal individual and cumulative adverse effects will result from the Corps authorizing projects under the program. For example, we have made substantial changes to NWP 26, with an ultimate approach of more clearly defining the activities regulated through activity-specific replacement general permits. The interim changes to NWP 26 we have made will greatly increase environmental protection while increasing the review time for a relatively small percentage of the total number of activities authorized each year. We have also become increasingly aware of the concerns that NWPs, particularly NWP 26, need to be modified to reflect regional differences in aquatic ecosystem functions and values and to more effectively reflect the desire of the states to develop partnerships to protect the aquatic environment. We, therefore, have directed our districts to carefully review all of the NWPs, particularly NWP 26, to revoke applicable NWPs in high value aquatic ecosystems, and to add regional conditions to limit the applicability of the NWPs to ensure that no more than minimal adverse effects occur in each district. We are also directing the districts to work with the states to develop mutually agreeable conditions that will result in a greater level of state Section 401 water quality certifications being issued for the NWPs. We are directing our districts to develop local procedures with their counterparts in the U.S. Fish and Wildlife Service and National Marine Fisheries Service which will ensure that the Corps bases its ''affect'' and ''jeopardy'' decisions on the best available information. We are also initiating formal programmatic consultation under section 7 of the Endangered Species Act regarding the procedures associated with administering the NWP program. We believe that the changes described above, along with many others we have included in this reissuance of the NWPs, will substantially increase protection of the aquatic environment, ensure that no more than minimal adverse effects will occur, and maintain the regulatory flexibility necessary to administer a reasonable regulatory program.

EFFECTIVE DATE: February 11, 1997.

ADDRESS: Information can be obtained by writing to: Office of the Chief of Engineers, ATTN: CECW–OR, 20 Massachusetts Avenue NW., Washington, DC 20314–1000.

FOR FURTHER INFORMATION: Contact Mr. Sam Collinson or Mr. John Studt, at (202) 761–0199 or access the U.S. Army Corps of Engineers Regulatory Home Page at: http//:wetland.usace.mil/

SUPPLEMENTARY INFORMATION:

Background

The White House Office on Environmental Policy announced the President's Wetlands Plan on August 24, 1993. The plan sets forth a comprehensive package of improvements to Federal wetlands protection programs. A major goal of the plan is that the programs be fair, flexible, and effective. To achieve this goal, the Corps regulatory program must continue to provide effective protection for wetlands and other aquatic resources, while conveying to the public a clear understanding of regulatory requirements. In its implementation, the regulatory program must be administratively efficient, flexible yet predictable, and avoid unnecessary impacts to private property, the regulated public, and the environment.

There were 37 existing nationwide permits. Thirty-six of the NWPs were published in the November 22, 1991, **Federal Register** (FR) at 33 CFR part 330, appendix A (56 FR 59110). They became effective on January 21, 1992, and expire on January 21, 1997. One additional NWP, the Single-Family Housing NWP (NWP 29), was proposed in the **Federal Register** on July 27, 1995, (60 FR 38650) and became effective on September 25, 1995. NWP 29 would expire on September 25, 2000.

In the preamble of the Final Rule at 33 CFR part 330, as published in the **Federal Register** (56 FR 59110) on November 22, 1991, we indicated that upon expiration of the existing NWPs, we would issue the NWPs separately from the regulations governing their use and rescind 33 CFR part 330, appendix A. The NWPs will now be published using the procedures adopted on November 22, 1991, for issuance, re-issuance, modification, and revocation of NWPs (see 33 CFR 330.5). The NWPs will no longer appear in the Code of Federal Regulations (CFR) but will be published in the **Federal Register** and announced, with regional conditions, in the public notices issued by Corps district offices, and included on the Internet.

We are reissuing all the existing NWPs; however, several have been modified, as have several NWP conditions as published in the **Federal Register** (56 FR 59110) on November 22, 1991. Many of the proposed clarifications are a result of the modification of the definition of ''discharge of dredged material'' at 33 CFR 323.2(d), as published in the **Federal Register** (58 FR 45008) on August 25, 1993 (i.e., the excavation rule). The definition was revised to include the following language that clarified which excavation activities are regulated: ''(iii) Any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation'' (See 33 CFR 323.2(d) for the complete definition of ''discharge of dredged material'').

We are also issuing, in accordance with the President's Wetlands Plan, two new NWPs to authorize those additional regulated activities with minimal adverse effects that resulted from the excavation rule. These new NWPs include: NWP 30, Moist Soil Management for Wildlife; and NWP 31, Maintenance of Existing Flood Control Projects.

The Corps believes that, when the changes to the nationwide permits and their conditions are considered as a whole, the average approval time for

projects requiring a Department of the Army permit will not substantially change. However, the individual approval time for some projects will be longer while for others it may be shorter. In addition, we believe that the approval time for a vast majority of activities authorized by nationwide permits will not be affected by these changes.

We have made a final determination that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Environmental documentation and a Finding of No Significant Impact (FONSI) have been prepared for each NWP. This documentation includes an environmental assessment and, where relevant, a section 404(b)(1) Guidelines compliance review. Copies of these documents are available for inspection at the office of the Chief of Engineers, at each Corps district office, and on the Corps Home Page at http://wetland.usace.mil/. Based on these documents the Corps has determined that the proposed NWPs comply with the requirements for issuance under general permit authority.

The 36 nationwide permits issued or reissued effective January 21, 1991 will expire on January 21, 1997; however, all of these permits are being reissued with an effective date of February 11, 1997. There will be a period between January 21, 1997 and February 11, 1997 where these 36 NWPs will not be in effect. Between today and February 11, 1997 the permittee may submit Pre-construction Notifications (PCNs) required by the terms of certain NWPs, in accordance with the NWP ''Notification'' General Condition. However, the 30 day (45 day for NWP 26) time period in the notification condition will not start until February 11, 1997. Further, Corps districts will review PCNs during this period and will verify projects as soon as possible after February 11, 1997. Nationwide Permit 29, Single Family Housing, is revoked and reissued with new conditions on the same effective date, February 11, 1997, and therefore, there will not be a period of time where NWP 29 is not in effect. Permittees may submit PCNs at any time, however, the 30 day time period for the reissued NWP 29 will not start until February 11, 1997. In addition, two new nationwide permits, NWP 30 and 31, are being issued with the same effective date. All of the issued and reissued nationwide permits, with the exception of NWP 26, will expire in 5 years on February 11, 2002 unless otherwise modified, reissued or revoked. Nationwide Permit 26 will automatically expire 2 years from today's date unless otherwise modified or revoked.

Many of the nationwide permits have been modified in the course of reissuance. The continued adequacy of an authorization under a nationwide permit, following its expiration, is dependant upon whether that permit has been reissued with or without modification. A nationwide permit is considered to have been modified if either the permit scope or limitations have been modified, or if one of the nationwide permit conditions which applies directly to the activity has been modified. In those cases where the nationwide permit is being reissued without change, and General Condition 4 does not directly apply, the verification remains valid as issued. In those cases where the previously used nationwide permit is being reissued with modification (NWPs 6, 12, 14, 21, 26, 27, 32) or General Condition 4 directly applies to the activity, activities which commence (i.e., under construction, or are under contract to commence) in reliance upon the earlier NWP, prior to January 21, 1997, will remain authorized provided the activity is completed prior to January 21, 1998, unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5 (c) or (d). Activities completed under the authorization of a nationwide permit that was in effect at the time the activity was completed continue to be authorized by that nationwide permit. DE's will, in accordance with 33 CFR 330.6(a), provide applicants with the above information in their responses to requests for verification of compliance with nationwide permits. These procedures are specified in 33 CFR 330.6(b).

Discussion of Public Comments and Changes

I. Overview

Approximately 4,000 comment documents addressing the proposed nationwide permits were received in response to the June 17, 1996, **Federal Register** announcement (61 FR 30780), district public notices, one national public hearing, and 6 regional public hearings. The Corps has reviewed and considered all the comments. Many of the comments expressed support for the nationwide permit program while many others opposed the program. Most comment letters provided permit specific comments, providing information and recommending changes to both the permits and permit conditions. A few commenters provided comments specific to 33 CFR part 330, our regulations governing implementation of the nationwide permit program. These comments were also reviewed and have been made a part of the record. However, no changes have been proposed for 33 CFR part 330 and, therefore, it is not being revised at this time.

II. General Comments

Regionalization of Nationwide Permits

The Corps proposed a process to regionalize the nationwide permits, particularly NWP 26, in order to reflect the differences in aquatic ecosystem functions and values that exist across the country. We envisioned a process where we would solicit the views of the various stakeholders regarding the nationwide permits and develop region-specific approaches for each district to best protect the environment while providing fair, reasonable, and timely decisions for the regulated public. The final permits we are issuing today reflect a clear decision to proceed in a way that does regionalize the program, particularly NWP 26. We are issuing NWP 26 for an interim period of two years, during which we will gather interested parties at the national level as well as the district and division levels, to develop replacement permits for NWP 26. The replacement permits will be activity-specific rather than the geographic based approach of NWP 26. By developing activity-specific NWPs to replace the existing NWP 26, we will be able to more clearly and effectively address the potential impacts to the aquatic environment, as well as more effectively address specific applicant group needs.

Once the Corps establishes activity-specific replacement permits that have clear national conditions to ensure the aquatic environment is protected and the impacts will be no more than minimal, each district, working with the Corps divisions, will establish regional conditions for the activity specific replacement permits. This may result in the revocation of certain NWPs in aquatic environments of particularly high value, and the addition of regional limitations to specifically address needs for protection of specific environmental assets. Of course, we will continue to encourage all districts to develop programmatic general permits (PGP) with states and other regional authorities that effectively regulate the waters of the United States. When such permits are developed and issued, it is often appropriate for the Corps district

to revoke the nationwide permits in the area covered by the (PGP), provided the PGP provides at least the level of protection of the aquatic environment that the Corps does through its administration of the NWP program.

During the next two years, as the Corps develops the activity-specific replacement permits, the revised NWP 26 will be in effect. We have substantially changed NWP 26, with additional nationwide limitations and conditions, in order to provide substantially improved protection of the aquatic environment, and to ensure that only minimal adverse effects will result from use of the NWP. These additional limitations and conditions are discussed in detail in the preamble for NWP 26 below, as are the specific means by which we have directed the districts and divisions to regionalize NWP 26. In summary, we have directed our districts working with the divisions and Federal and state natural resource agencies to add region-specific conditions to all NWPs, paying particular attention to NWP 26, which will add an additional layer of protection to the changes we have put into place at the national level. This process will also involve public notice and comment to ensure that all interested parties have the opportunity to be involved in the process.

Reissuance Process

A few commenters also commented on the process we used for reissuance of the NWPs. One commenter felt that the Corps should have requested comments and suggestions from the public prior to issuance of the proposed nationwide permits. A few expressed concern that the Corps Special Public Notices, announcing the proposed nationwide permits and requesting comments, did not include sufficient information to generate meaningful comment by the public. These commenters felt that the public notices should have included such information as: The text of all nationwide permits proposed for reissuance, legal and biological justification for reissuance, the location of records regarding use and impacts of the nationwide permits, potential additional impacts due to reissuance or modification of the permits, the extent and effectiveness of existing mitigation permit conditions, the effect of the proposed changes in the permits, and the possible benefits to the nation of eliminating specific NWPs. These commenters also felt that the comment period was not adequate for so many permits at one time and recommended the Corps publish individual public notices for each permit, three per month, with 90 day review periods for each public notice.

The Corps believes that the process provided adequate information and time for public review and comment. We provided concise information regarding the proposed revisions to the nationwide permits and included the names, addresses and phone numbers of points of contact for requesting additional information. To include the information requested by a few reviewers as outlined above was not considered to be productive and the publication would be too voluminous and costly for publication and distribution to the general public. Information requests received during the review period were given priority and information was provided in as timely a manner as was possible. We extended the original 45 day review period by 14 days and added 6 regional public hearings to the originally scheduled hearing in Washington, D.C., in order to provide as much opportunity for the public to comment as was reasonable. In response we received approximately 4,000 letters of comment, and most of the public hearings were well attended. The Corps also believes it is much more efficient and less burdensome on all parties involved to collectively review all the nationwide permits at one time. To publish three notices a month for 90 days each would require more than a year to address all 39 NWPs and place a continuous review burden on the commenting public for the entire period. Such a process would also result in significant inefficiencies in the utilization of Corps limited resources for implementing the program.

Accounting

A substantial number of commenters stated that the Corps of Engineers should establish a system of record keeping to quantify impacts and mitigation, and that such records would be necessary to document that the nationwide permits have only minimal adverse environmental effects. Many commenters stated that the acreage lost due to nationwide permits is not known and the Corps cannot support a conclusion that the effects of the nationwide permits are not significant. A number of commenters stated that reporting should be required for all nationwide permits while others called for reporting for any permit which might have more than minimal impact. Comments indicated that, at a minimum, data reported should include the location and size of any wetlands, and should be collected by activity, nationwide permit number and acreage for each aquatic type. A large number of commenters asked that the records be published quarterly or annually and one suggested they be made available on the Internet.

The Corps has collected and reviewed specific data to assist in making program-wide determinations and decisions regarding the NWP program. While we believe that the data currently being collected for most nationwide permits is sufficient for these purposes, we are increasing the information we will regularly collect in the future. In particular, we are making changes to NWP 26 that will substantially increase the data base regarding that permit. Many districts also collect additional data relative to the use of nationwide permits for use in regionally conditioning the nationwide permits and evaluating specific actions on a case-by-case basis. We do not have the resources necessary for field verification of all nationwide authorizations and associated mitigation efforts. While we do not believe it is necessary to publish periodic reports regarding the nationwide permit program, information and data collected is available for public review upon request. Each district does periodically publish a ''Permits Issued and Denied'' report which is currently sent to standard mailing lists. The Corps is planning to provide access to such information and data via the Internet.

Enforcement

Most of those who commented on the enforcement of nationwide permits expressed the belief that the Corps has not enforced permit conditions or verified that projects are eligible for the nationwide permit issued. One commenter stated that lax enforcement gives violators an economic advantage over those who comply with the law. Commenters stated that the Corps must develop a system to monitor activities, verify applicant information, and enforce conditions. Several comments suggested conducting random inspections and penalizing violators. Other proposals included recommendations that we develop a process to allow citizens to petition the Corps to address a situation where conditions are not being met, or to allow citizens to sue the Corps to enforce conditions.

The Corps has limited human resources to manage the entire Regulatory Program. Since properly developed and coordinated nationwide permits have minimal individual or cumulative adverse effects, we direct the majority of our efforts to projects with a greater potential for impact to the environment. Every application

received is reviewed and a determination is made whether the project is authorized by an existing general permit or requires a standard individual permit (IP) evaluation process. The Corps does inspect a selected number of permitted activities, including nationwide permit activities, each year to encourage and verify compliance with all terms and conditions of the permit (individual or general). The Corps does follow up on reports of alleged violations of the Clean Water Act (CWA) and/or the Rivers and Harbors Act of 1899 (RHA) and pursues resolution of those actions. The Corps currently accepts and investigates suspected violations reported by citizens. Furthermore, each district has an enforcement program and administers it in a manner to provide the most effective compliance with the CWA, to include spot checks, monitoring, reporting, etc.

Notwithstanding the above, we agree that we need to do more to ensure compliance. Therefore, the Corps is, with the reissuance of the NWPs, instituting a program that will require every verified permittee to certify, in writing, that they constructed the project in accordance with the permitted plans, including any mitigation. The Corps is reviewing its enforcement and compliance program to determine if additional guidance is necessary.

Stacking of NWPs

Many commenters indicated that the use of multiple NWPs for a single project (a practice referred to as ''stacking'') should be eliminated or restricted because it allows opportunity for greater than minimal adverse effects to result under nationwide permit authorizations.

The purpose of the NWP program is to authorize activities that cause only minimal individual and cumulative adverse environmental effects with a minimum of administrative processing. While being responsive to applicants and protective of the aquatic environment are considerations that must be balanced, the Corps understands fully that the statutory threshold of ''minimal adverse effects'' is controlling, whether the action involves the use of one or more NWP. We believe that, under certain circumstances, NWPs can be used in combination and result in only minimal individual and cumulative adverse environmental effects. In this regard, our regulations provide for multiple use of NWPs (but each one only once for a single and complete project) provided that the combined adverse effects are minimal. If an activity, otherwise eligible for a nationwide permit, is an integral part of a project for which a standard individual permit is required, it cannot be authorized by an NWP. Most combinations of NWPs allowing discharges of dredged or fill material in waters of the United States (including wetlands and other special aquatic sites), require a PCN to the District Engineer (DE). The PCN process requires the District Engineer to determine whether the activity or combination of activities will result in more than minimal individual or cumulative adverse environmental effects. With this notice we are directing all District Engineers to conduct very critical reviews of projects involving stacking to ensure that no more than minimal adverse effects will occur.

While the Corps allows, under certain specific circumstances, the multiple use of NWPs for single and complete projects, many NWPs are generally ''stand alone'' project authorizations (e.g., NWP 21 would authorize all activities associated with the project) without the need for other NWPs. Some other NWPs, while they are occasionally used with other NWPs, generally are not (e.g., NWP 28 for modification of an existing marina is mostly used alone); however, occasionally it may be used with NWP 3 for repair of an existing structure or with NWP 13 for some bank stabilization. Generally, only 7 of the 37 NWPs are used more than occasionally with certain other NWPs for authorizing projects. These 7 NWPs are 3, 12, 13, 18, 19, 26, and 33. We believe that of those 7 NWPs, those with the potential to have more than minimal impacts, when used with certain other NWPs, are NWPs 18 and 26 in combination with each other and with NWPs 14 and 29. Consequently, to ensure that the multiple use of nationwide permits does not result in more than minimal adverse effects, the Corps will restrict the multiple use (i.e., stacking of those nationwide permits) as follows. NWP 14 has been modified so that it cannot be combined with NWP 18 or NWP 26 for the purpose of extending the limitations of any of the three permits. For example, NWPs 14 and 26 cannot be combined to authorize a fill of 3⅓ acres. Furthermore, NWP 18 cannot be combined with NWP 26 to increase the threshold or the limitations of NWP 26. NWP 29 is already conditioned that it cannot be used in conjunction with NWP 14, NWP 18, or NWP 26. We have also limited the impacts allowed when stacking any NWP with NWP 26 or NWP 29. Whenever any other NWP is used in conjunction with NWP 26, the total acreage of impacts to waters of the United States, for all NWPs combined, cannot exceed 3 acres. Similarly, whenever any other NWP is used in conjunction with NWP 29, the total acreage of impacts to the waters of the United States, for all NWPs combined, cannot exceed ½ acre. We believe that these limitations will eliminate abuse of stacking while allowing appropriate multiple use of some nationwide permits. For example, the Corps could authorize a 0.3 acre road crossing to a 2.5 acre NWP 26 fill project, with appropriate avoidance and mitigation.

Finally, we have added General Condition 15 ''Multiple Use of Nationwide Permits'' that requires a Corps-only PCN in any case where any NWP 12 through 40 is combined with any other NWP 12 through 40 for a single and complete project. For example, if an applicant wishes to combine the use of NWP 14 for a road that does not involve fill in wetlands and NWP 13 for a bulkhead less than 500 feet in length, a Corps-only notification will be required; even though, the use of these NWPs for the projects described do not require a PCN if constructed independently. However, the change noted above will ensure that for combinations that have the potential to result in more than minimal adverse environmental effects, a Corps-only PCN will be required.

State Section 401 Water Quality Certification

Many commenters expressed opposition to the Corps practice of issuing provisional verifications of authorization under nationwide permits for which section 401 water quality certifications have been denied by the state. They expressed the belief that it put undue pressure on the states to certify the projects. Some also commented that it was unfair to require the states to issue, deny, or waive water quality certification within 60 days of receipt of an individual request for certification. Some felt that if a state denied water quality certification for a nationwide permit, the Corps should not authorize any projects under that particular NWP and that the projects should be evaluated under the individual permit procedures. Others believed that administration of sections 401 and 404 should be merged for NWP 26.

It is important to emphasize at the outset that it is the intent of the Corps to work closely with states and Tribes (or EPA where appropriate) during the next 60 days to facilitate State 401 Water Quality Certification. The Corps is committing to meet with the states

and Tribes at the District level, with the goal of ensuring that issuance of each of the NWPs in today's package is consistent with Water Quality Standards established by the states, Tribes, and EPA. This process will include discussion and incorporation of appropriate terms and conditions that would ensure consistency with state/Tribal Water Quality Standards.

We believe that the procedures in 33 CFR part 330 regarding state 401 water quality certification are appropriate and provide a reasonable approach for the state to ensure their water quality standards will be met. Moreover, we believe denial of a 401 water quality certification for a nationwide permit should not be the sole basis for requiring an individual permit application for activities that would otherwise comply with the terms and conditions of that nationwide permit. Denial of state water quality certification for a nationwide permit does not necessarily mean that unacceptable adverse environmental effects will occur on a case-by-case basis. Rather, it indicates that the state is not confident that state standards will be met in all cases. It follows then that, based on the state's denial, the Corps denies authorization, without prejudice, for those activities for which the state denied section 401 water quality certification. Those activities cannot proceed under an NWP or an IP unless the state subsequently issues or waives a water quality certification for that activity. Thus, when the state determines that state standards are met in a specific case (i.e., an individual 401 water quality certification is issued or is waived), the nationwide permit authorization should be available to the prospective permittee. Finally, this approach is based on our desire to develop effective partnerships with states where workload is shared, regulatory duplication is reduced, and neither the Corps nor the states determine how the other party discharges its regulatory responsibilities.

Given the concern regarding the potential water quality impacts of NWP 26, the Corps will also provide an additional opportunity for review for this NWP. In those circumstances where a state has denied section 401 water quality certification for activities between 1/3 and one acre, EPA may request that the Corps provide EPA with PCNs for those proposed activities in the state. Specifically, if the Regional Administrator requests PCNs in those states that have denied water quality certification, the Corps will provide PCNs to EPA consistent with the notification general condition. EPA will work with the other Federal resource agencies to determine which PCNs they wish to receive, and will forward them as appropriate. We anticipate that in most states the agencies will not be receiving PCNs for discharges between 1/3 and one acre because of the Corps commitment to work with the states to ensure, to the best of our ability, that Section 401 water quality certification will be granted.

Several commenters stated that the Corps ought to prevent the states from requiring verification of authorization from the Corps under section 404 prior to receiving 401 certification or waiver thereof. Other commenters stated that the Corps should limit the states' review under section 401 to only 21 days. The Corps believes it would be inappropriate for us to instruct the states on implementation of their responsibilities under section 401, but rather we will work with the states to resolve concerns regarding impacts to the Nation's waters and implementation of our respective regulatory programs on a programmatic basis. This will include discussions between the states and the Corps on a reasonable period of time for the states to act on an individual Section 401 water quality certification.

One commenter recommended an additional general condition requiring that projects otherwise eligible for nationwide permits also be consistent with the requirements of section 303 of the Clean Water Act. The states, as part of their review and evaluation under section 401 of the Clean Water Act, are responsible for ensuring compliance with several sections of the Clean Water Act, including section 303. Therefore, we have proposed no changes for this provision.

Publication of the Nationwide Permits in the CFR

Many commenters were opposed to publishing the NWPs only in the **Federal Register** (FR) and suggested that they be published in both the Code of Federal Regulations (CFR) and FR. Many indicated that using the CFR is easier and more accessible and that the FR would make it more difficult and even a burden for the public to obtain a full list of available NWPs. One commenter stated that the Corps failed to provide an explanation of why it proposes to publish the NWPs only in the FR. One comment indicated that most county and university law libraries have the CFR, but not back issues of the FR; that only libraries with Federal document depositories have FRs and very few carry back issues. One commenter pointed out that although FRs are found on databases or CD Rom (e.g., Environmental Law Reporters) they usually have only the prior year on database. Therefore, they would have no access until the nationwide permits are over one year old.

One commenter requested that the final announcement include a summary of nationwide permits valid in each state to provide those who work in multiple states with a ''one-stop reference'' of potential nationwide permits.

The final nationwide permits have not been included in the CFR and are being published herein, following procedures similar to those for individual permits and regional general permits, because NWPs are permits, not regulations, and therefore, are not appropriate for publication in the Code of Federal Regulations. While publication in the CFR would provide a ready reference, publication of the final decisions on the nationwide permits are announced in the **Federal Register** and will also be published through regional public notices issued by District Engineers. Moreover, publication of the nationwide permits in the CFR does not provide an accurate representation of the nationwide permits for any particular area. Such CFR publication would not include the state 401 position nor regional conditions imposed by the local Corps district and division offices. Furthermore, the CFR is only published once a year. Therefore, the reissued NWPs would not be published until July 1997. In addition, it is our intention to ensure that all of the pertinent statutes, regulations and other guidance, as well as the nationwide permits including district regional conditions, be made available on the Internet in the near future.

Compliance With the National Environmental Policy Act

Numerous commenters stated that issuance of the NWPs in their proposed form would constitute a major Federal action which would have a significant effect on the human environment, thus requiring preparation of an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). Numerous commenters also contended that the Corps decision documents are inadequate, do not provide enough information, and are based on insufficient data to appropriately evaluate the impacts of the NWPs. Many of the comments received indicated the Corps should prepare an EIS to ensure that adverse effects are minimal. One commenter added that, at a minimum, an EIS should be prepared for NWPs 26

and 29. Other commenters listed the following NWPs as needing an EIS: NWPs 12, 13, 14, 21, 34, and 40.

Several commenters requested that the Corps prepare a cumulative impact analysis now and make it part of an EIS. Several different commenters provided the following estimates of cumulative impacts occurring under the existing NWP program as acres of wetlands lost: 70,000 acres per year; 82,000 acres from 1988 to 1996 nationwide from 27 of the 36 Corps districts and only from NWPs that were reported to the Corps (included in this figure was an estimate of 4,333 acres of vernal pools lost in California); in 1994 more than 90,000 wetland filling activities proceeded under Corps general permits; nearly one-half million activities; the sum of the small, 0.5-acre, wet areas, like the prairie potholes and vernal pools, impacted is biologically significant; the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) Pre-construction Notification (PCN) database from 1992 to 1996 indicated a loss of 5,500 acres in the southeast region of the United States (Florida had more than 2,000 acres, Georgia, more than 1,000 and coastal Texas 300 acres in Harris County alone).

Several commenters raised the issue of alternatives analysis. One commenter recommended that a full range of reasonable alternatives be explored in the decision documentation, to include not only alternative formulations of the individual NWPs, but also alternative approaches to NWPs, in general. The commenter states that Programmatic General Permits (PGPs), including state PGPs, have already been demonstrated to be effective in several northeastern states. One commenter requested that the decision documents incorporate the regional conditions.

The Corps has collected data relevant to the usage of nationwide permits and associated impacts and we believe that our data demonstrate that the adverse effects from the previous NWPs were minimal. These data show that for Fiscal Year 1995 (FY95) a total of 43,775 activities were authorized with written Corps verifications under all of the NWPs nationwide (this total does not include those for NWP 27, which allows for creation, enhancement and restoration of wetlands and are, therefore, anomalous to this data set). These authorizations under all of the NWPs adversely affected approximately 6,500 acres of wetlands and the Corps received approximately 7,800 acres of mitigation in return. It is estimated that there were approximately 87,000 activities authorized by all of the NWPs nationwide that did not require a PCN, or were otherwise verified in writing by the Corps. We estimate that these unverified authorizations adversely effected an additional 4,300 acres of wetlands. Although this is less than many have suggested, we are consciously striving to reduce this loss through the changes to the program set forth here today. Moreover, the provisions and limitations of the nationwide permit program ensure that those activities authorized by NWPs will have less than minimal adverse environmental effects. Notwithstanding our continued belief that adverse effects of the NWP program have been minimal and the fact that the NWPs we are issuing today will substantially reduce potential effects, the Corps will collect additional data on the reissued NWPs, to document more fully the impacts. For all NWPs that involve a PCN, we will collect data on the acreage of impact and acreage of mitigation. We are also adding a condition to NWP 26 that will require all permittees to notify the Corps of the acres of impact of their project.

The Corps evaluation of the impacts on the aquatic environment resulting from the Nationwide Permit (NWP) program indicates that the cumulative adverse environmental effects are minimal and not significant. This is based on our belief that cumulative impacts must be viewed in the context of the individual watersheds. We believe that past regional conditions placed on NWPs, particularly NWP 26, in many districts have substantially reduced cumulative impacts on a watershed basis. Districts have revoked NWP 26 in many high value watersheds and placed additional notification or other limitations on NWP 26 to ensure minimal adverse environmental effects to specific watersheds. Although these past regional protections have substantially reduced adverse environmental impacts, we believe additional protections are needed to continue to ensure that only minimal adverse environmental effects will occur. Some of the additional protections we are implementing include substantially reducing the acreage limits under NWP 26, ensuring that stacking of NWPs impacts a maximum of 3 acres and only after a review by the Corps, substantially increasing the number of instances where a Corps review is necessary, and requiring increased and more detailed data collection to better monitor NWP activity. Moreover, we are more strongly directing the Corps districts and divisions to add regional conditions for high value watersheds, and additional generalized regional conditions that will ensure that only minimal impacts will occur. This will also ensure that cumulative impacts will not be significant.

In that the adverse effects will be less than minimal, it also follows that they will not result in ''significant impacts on the human environment,'' the threshold requiring an EIS as defined within regulations implementing NEPA. Thus, no EIS is required prior to finalization of these nationwide permits. Formal documentation of the Corps analysis and determinations have been prepared in compliance with NEPA and the Clean Water Act. This documentation includes an environmental assessment and, where relevant, a section 404(b)(1) Guidelines compliance analysis. Copies of these documents are available for inspection at the office of the Chief of Engineers and at each Corps district office. Additionally, Division Engineers will supplement the national NWP decision documentation to discuss regional conditions and regional revocation requirements, which further ensure that the impacts are minimal. These supplements will be available for inspection at the appropriate district offices. We have prepared a programmatic alternatives analysis for each NWP which discusses administrative alternatives to issuing each NWP.

General Permit Criteria

Several commenters requested that the Corps define what constitutes ''minimal'' adverse effects and ''similar in nature'' and prove or guarantee that the NWPs meet the legal requirement that wetland fills have no more than minimal adverse effects before the NWPs are reissued. One commenter stated that the Corps simply ignores the requirement of section 404(e) for activities that are ''similar in nature'' and have no more than minimal adverse effects on aquatic resources such as wetlands. Another commenter recognized that generally the NWPs are conditioned to ensure that adverse effects will be minimal, but was nevertheless concerned that there are many serious exceptions, noting NWPs 26, 29, 34, and 40. One commenter argued that some of the NWPs covering activities that are similar in nature could affect wetlands that were not similar, including NWPs 7, 12, 13, 14, 16, 17, 19, 21, 25, 26, 29, 33, 34, 37, and 40. Most commenters indicated that NWP 26 was of most concern and others commented that, without mitigation, there could be a cumulative effect. Several commenters recommended that

the Corps first obtain data to determine the extent of the project impacts. Without such data, they maintain that it is difficult to accurately assess if wetland fills authorized by the NWPs comply with the Clean Water Act requirements for no more than minimal individual or cumulative adverse environmental effects.

We have determined that it is not appropriate to define the term ''minimal'' at the national level, because what constitutes minimal adverse environmental effects can vary significantly from resource to resource, state to state, county to county, and watershed to watershed, as well as district to district. Moreover, the term ''minimal'' must be defined based on the effects of the specific project in the immediate vicinity, and in the watershed where the activity will occur. Simply listing the acres lost nationally is not instructive regarding minimal adverse effects. Therefore, the determination of ''minimal'' adverse environmental effects is left to the discretion of the DE. The district represents the most knowledgeable office concerning the aquatic resources within that particular region, and the DE is therefore the most capable of assessing relative impacts that would result from activities authorized under the NWP program. We believe that each nationwide permit authorizes similar activities within the definition for general permits as defined in 33 CFR 322.2(f) and 323.2(h), and with each district's capability to identify impacts associated with these activities and the ability of the DE to require project specific mitigation or to exercise discretionary authority, activities authorized under these NWPs will have less than minimal adverse effects. The Corps divisions have had the authority, based on recommendations from the Corps districts, to reduce potential adverse effects by imposing regional conditions or revoking the applicability of specific NWPs in high value aquatic areas. The Corps divisions have used this authority in many cases. However, we are, in this notice, further emphasizing to all Corps districts and divisions that they should use this authority within their geographical areas to further ensure that only minimal individual and cumulative adverse effects will occur. We expect that each division will, based on the recommendations from each district, restrict the use of several nationwide permits to ensure protection of high value aquatic systems under its authority. Moreover, districts will ensure that adverse effects under NWP 26 are minimal by requiring mitigation for most projects above ⅓ acre. This determination is further reinforced by the NEPA and Section 404 evaluations discussed above. The collection of detailed data for the purpose of addressing cumulative impacts is also addressed above under ''Compliance with the National Environmental Policy Act.''

Endangered Species

The Corps believes that the procedures that we have in place ensure proper coordination under section 7 of the Endangered Species Act (ESA) as well as ensuring that threatened and endangered species will not be jeopardized and their critical habitat will not be destroyed. We also believe that current local procedures in Corps districts are effective in ensuring that the ESA is fully complied with under the nationwide permit program. Finally, we have incorporated several additional assurances into the program which have resulted from informal consultation with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS).

Under the current Corps regulations for our NWP program (33 CFR 330.4(f)), each district must consider all information made available to it, and information that it has in its own records, to determine whether any listed threatened or endangered species or critical habitat may be affected by a specific permit action. Based upon this consideration and evaluation, the district will initiate consultation with the FWS or NMFS, as appropriate, if the district determines that the regulated activity may affect, or if the district believes that the action is not likely to adversely affect, any endangered species. Consultation may occur under the NWP process or the district may assert its discretionary authority to require an individual permit for the action and initiate ESA consultation during the individual permit process. If the ESA consultation is conducted under the NWP process without the district asserting its discretionary authority and require an IP, then the applicant will be notified that he cannot proceed until the consultation is complete. If the district determines that the activity would have no effect on any endangered species, then the district would proceed to issue a NWP verification letter. The Corps verification letter will explicitly state that the Corps has made a determination of no affect on endangered species.

Corps districts have, in most cases, established informal or formal procedures with their local counterparts in the FWS and NMFS through which the agencies share information regarding endangered species. Information developed, shared, and used by the local Corps and FWS/NMFS offices result in the Corps becoming aware of potential adverse effects on ESA-listed species. In most cases, maps and computer data bases are available on the local level that identify locations of populations of endangered or threatened species and their critical habitat. Moreover, for cases which involve a level of potential adverse effects that require a PCN process of coordination with the other agencies, the Corps is now specifically requesting any information that the FWS or NMFS may have on endangered species as part of the PCN consultation. Thus, based on location of the project, an additional level of review now exists for these types of projects. Furthermore, the Corps is now requiring additional PCNs in additional areas and for additional types of activities to ensure that the potential NWP effects will be minimal, for example, the lowered threshold levels of NWP 26. This provides for an additional level of review for many more activities. Any information provided through the PCN process will be used by the district to make its ''may affect,'' ''not likely to adversely affect'' or ''no affect'' determination.

In addition to the procedures listed above, each NWP verification includes General Condition 11, which states that ''no activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species * * * or which is likely to destroy or adversely modify the critical habitat of such species.'' Also, to avoid possible confusion on the part of some applicants, Condition 11 has been modified to clarify that this NWP does not authorize the taking of Federally listed threatened or endangered species. This should help ensure that applicants do not mistake the Corps permit as a Federal authorization that would allow the taking of Federally listed threatened or endangered species.

Although the Corps continues to believe that these existing procedures ensure that the Nationwide Permit Program complies with the ESA, we will take the following additional steps to provide further assurance. First, although not required, the Corps will initiate programmatic formal section 7 consultation with the FWS and NMFS as a precaution to further ensure that there is no adverse effect on listed species. We intend that formal consultation will be concluded as soon as possible but not to exceed two years from the date of issuing the revised and

reissued NWPs. Second, the Corps will direct the district offices, in writing, to meet with appropriate local representatives of the FWS and NMFS and to establish or modify existing procedures to ensure that the Corps has the latest information regarding the existence and location of any Federally listed threatened or endangered species or their critical habitat in its district. This will ensure that districts have the best information available to make decisions regarding whether an activity may affect an endangered species and thus whether or not to initiate consultation. The Corps districts can also establish through local procedures, regional conditions or other means of additional consultation for areas of particular concern that a permitted activity may affect an endangered species. The Corps believes that the procedures that we have in place ensure proper coordination under section 7 of the ESA, as well as ensuring that threatened and endangered species will not be jeopardized, and that their critical habitat will not be destroyed.

While we are issuing/reissuing this entire package of NWPs (except for NWP 26) for a period of five years, we will be working over the next twenty-four months to collect data, monitor use of these NWPs, and conduct formal consultation under section 7 of the ESA. This two year process is intended to provide us with more detailed information on the types of activities being authorized, the nature and extent of wetlands and other waters being affected by the NWPs, and potential effects to the Nation's Federally listed threatened and endangered species. Immediately following the conclusion of this two year process, we will use the results of this data collection, analysis, and consultation to reevaluate the NWPs being issued/reissued today to determine what modifications are necessary. We will provide to the public, by notice in the **Federal Register**, the results of our data collection and consultation. In addition, we will provide the opportunity for public comment on changes to the NWP program that might be necessary to ensure compliance with the CWA, ESA and NEPA. In the interim, we would welcome any comments or information that the public might wish to provide relevant to our data collection and consultation process.

III. Comments and Responses on Specific Nationwide Permits

1. Aids to Navigation: Two commenters supported reissuance of this NWP and no changes were proposed. NWP 1 is reissued without change.

2. Structures in Artificial Canals: No changes to this permit were proposed by the Corps. One commenter suggested the term ''artificial canal'' be defined and that the definition exclude historic sloughs or channels. Another commenter suggested that the term ''structures'' is too vague and requested clarification on the interpretation of ''principally residential canals,'' whether this NWP authorizes the removal of structures, and whether it can be used in place of or in association with NWP 13 for bank stabilization.

While the term artificial canal could be misinterpreted by some to include channelized natural areas, this is clearly not the Corps interpretation. Should a Corps district find that individuals are using NWP 2 in such areas, the district would take appropriate action to bring such activities into compliance through proper procedures. In accordance with 33 CFR 322.5(g), structures in previously authorized canals would have been considered under applications for the original canal work. In grandfathered canals or in cases were structures may not have been considered, the DE may use discretionary authority to evaluate structures if more than minimal adverse effects are anticipated. Artificial canals within principally residential developments would be used primarily for personal or recreational egress and ingress rather than for commercial use. The Corps procedures, as outlined in the general condition for historic properties, comply with the requirements of 33 CFR part 325 appendix C, which implements 36 CFR part 800 and fully satisfies the requirements of National Historic Preservation Act (NHPA). This nationwide permit is not to be used for bank stabilization projects; such projects should be reviewed for authorization under NWP 13. In case(s) of independent utility, NWP 2 may be used in conjunction with NWP 13 provided individual or cumulative adverse effects are not more than minimal. We anticipate that the impacts resulting from the removal of structures in artificial canals would be similar to the impacts derived from the original installation. Consequently, removal activities are authorized by this NWP. NWP 2 is reissued without change.

3. Maintenance: The Corps proposed no changes to this nationwide permit. One commenter recommended that the NWP not allow restoration that clearly adversely affects fish and wildlife. Several commenters recommended that no deviation from the original design be authorized by the permit since changes could result in significant adverse effects, while one commenter suggested eliminating the qualification for ''minor deviation in the structure's configuration.'' Another commenter requested a list of types of authorized activities and that ''minor'' be defined. Another commenter asked for inclusion of bridge/culvert replacement that complies with flood-proofing and structural design standards.

The experience with NWP 3 has been very good; navigable waters have not been obstructed and impacts are very minor. Furthermore, in many cases, use of NWP 3 actually enhances the aquatic environment. For example, replacing a seawall that is damaged often results in eliminating chronic turbidity caused by erosion. Because all structures and fills require maintenance periodically and because infrastructure repair following national disasters is critical to the public welfare, we believe this nationwide permit is necessary. We are retaining the provision allowing ''minor deviations'' in order to provide the flexibility necessary to keep pace with construction technology, building codes and public safety. Activities with deviations resulting in more than minimal adverse effects would not be authorized by this nationwide permit, nor would activities having more than minimal adverse effects on fish and wildlife. The qualifications attached to the ''minor deviations'' provision are considered necessary in order to ensure adverse effects are avoided and minimized to the extent possible. This NWP is not limited by type of facility. ''Minor'' is not specifically defined, because the variety of structures and fills included makes defining the word impracticable. ''Minor'' is meant to refer to a level of project deviation which will result in a level of adverse environmental effects associated with the change that are no more than minimal. Bridge and culvert replacement in compliance with local requirements and design standards would normally be authorized under the permit if they meet the limitations and conditions of the permit.

One commenter requested that NWP 3 authorize activities previously authorized by 33 CFR 330.3 and equivalent authorizations at the state level or constructed prior to the excavation rule. NWP 3 specifically states in the first sentence that 33 CFR 330.3-authorized activities are included. Similar authorizations under state laws can vary considerably and may not be consistent with NWP 3; thus a blanket authorization is not appropriate. This nationwide permit is tied to structures

and fills only, and cannot be used to authorize the repair, rehabilitation or replacement of excavated facilities. The term ''structure'' does not include unconfined waterways, such as streams and non-lined drainage ditches. The term does include such activities as bank protection measures, ditches and canals lined with man-made and placed materials.

Several commenters recommended that fills and structures required by special conditions in a previously issued permit be covered. The NWP does authorize maintenance of such structures or fills that were previously authorized. This NWP does not authorize activities that were not previously authorized by the Corps.

Another commenter suggested that ESA coordination occur after catastrophic events when new habitat can be created but then damaged by repair activities. General Condition 11 and ESA section 7 require coordination for endangered species. Consideration of improved habitat is made under section 7.

Another commenter felt maintenance/operation plans should be approved before the work is conducted. We believe that this would create an unnecessary burden on the applicant and the Corps for authorization of maintenance and repair activities with less than minimal adverse effects.

One commenter believed that the two year construction time period should be extended, while another felt that two years is long enough. In our judgment, two years has proven to be a reasonable period that does not jeopardize environmental protection due to changing conditions. The permit includes provisions for the DE to extend the period if warranted.

Another commenter felt that this NWP should not be allowed in floodplains. We believe the floodplain capacity would not be appreciably changed for structures or fill maintenance and repair within the limits of this NWP.

One commenter suggested limiting the impact area and another suggested the PCN procedure be applied to this NWP. Since NWP 3 only authorizes structures and fills that are existing, the impacts have already occurred. Maintaining them creates little or no added adverse effects, which ensures that effects would be less than minimal. Therefore, we believe neither of these limitations should be applied. NWP 3 is reissued without change.

4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities: As part of the proposed modification of this permit, we were clarifying that the permit does not authorize the use of covered oyster trays or clam racks. One commenter questioned whether the prohibition on clam racks included ''clam bags'' and was concerned about the scope of ''covered oyster trays and clam racks.'' This commenter was also concerned about the harvesting of natural live rock, the inclusion of open water pens in the definition of ''impoundments or semi-impoundments for culture of motile specimens,'' or qualitative limitations to define ''small fish attraction devices''; and whether bottom dredging of sea grass areas or ''bottom tending gear'' for commercial purposes were authorized by this permit. One commenter suggested that the permit should specifically exclude commercial scale net pen culture in addition to oyster trays and clam racks. Another commenter asserted that shellfish beds should not be authorized under this permit. This commenter also stated that the exclusion of authorization of covered racks and the location of racks in wetlands of sites that support aquatic vegetation was not sufficient. The commenter cited information that described changes in species diversity associated with the location of racks on and in intertidal mudflats. One commenter stated that the permit should be modified to authorize the releases of scallop and hard clam seed into eelgrass cover. One commenter urged that small aquaculture projects be excluded from this permit, while another commenter stated that fish hatcheries should be specifically excluded. A few commenters suggested that the installation of fish ladders be included under the permit. One commenter was concerned about issuance of permits in areas that have been customary boating channels.

Each of the comments on this nationwide permit are expressions of concern for unique situations in specific regions of the Nation. It is not possible to address all the possible limitations and conditions that may be appropriate at a local or regional level. Nor can we address all the possible variations in terminology, such as ''clam bags.'' Therefore, we believe it is more reasonable and practicable for such comments to be addressed through regional conditions and the provisions for discretionary authority at the division and district levels. Corps districts have the authority, working with the divisions, to restrict use of this NWP in high value areas, such as particularly vulnerable seagrass beds, if they deem such restrictions to be necessary. The one change proposed by the Corps was not objected to and received some comments of support. Therefore, that change has been made to the permit in its reissuance.

Another commenter suggested that the permit be modified to include ''sites where submerged aquatic vegetation may not be present in a given year.''

Although we believe that the NWP language includes such sites in the terminology ''* * * or sites that support submerged aquatic vegetation * * *'' (i.e., a site may not have submerged aquatic vegetation present, but could support such vegetation), we have clarified this in the NWP. NWP 4 is reissued with the proposed changes and the clarification stated above.

5. Scientific Measurement Devices: The Corps proposed no changes to this NWP. A few commenters were concerned that the structures permitted by this NWP could preclude or substantially obstruct movement of aquatic organisms including migratory fish. One commenter was concerned that this NWP does not provide any limit on the size or use of the structures authorized and suggested that a maximum size be included (e.g., 1000 square feet). This commenter also recommended that the NWP be conditioned that the structure be used exclusively for purposes associated with scientific measurement to preclude anyone from using this NWP to circumvent the permit process. One commenter recommended that the 25 cubic yard threshold be maintained but to eliminate the PCN requirement.

We believe the concern for impeding the passage of fish or shellfish is addressed by General Condition 4. Due to the varying structures involved in scientific measuring devices, imposing a size limitation would be difficult and unwarranted. A condition will be added stating that any structure authorized by this NWP must be exclusively used for purposes associated with scientific measurements. We have also modified the PCN requirement so that applicants will need to notify only the Corps. NWP 5 is reissued with the modifications described above.

6. Survey Activities: The Corps-proposed changes to this nationwide included allowing discharges associated with the placement of structures necessary to complete a survey for historic resources and soil surveys. Most commenters supported the proposed changes. A few commenters requested that the placement of survey markers such as benchmarks and monuments be authorized under this NWP. One commenter felt that mechanical clearing of survey lines should be included, but limited to 8 to 10 foot widths. A few

commenters requested that limited discharges and structures necessary for the recovery of artifacts and information be included in the NWP rather than excluded as proposed. Many commenters asked for the exclusion of seismic exploratory operations involving the use of explosives, such as ''3–D'' operations, due to the extensive scope and environmental impacts of such activities. It was proposed that the term ''core sampling'' be changed to ''soil, rock and sediment sampling'' and changing ''exploratory-type bore holes'' to ''exploratory-type holes'' because while most sampling of rock may be by coring, much of the soil sampling is by other methods (i.e., augering, hand shovel, backhoe, etc). Other commenters asked that the permit language specifically indicate that no permanent structures are authorized, all fills be removed and that the area be restored to its original state.

The placement of survey markers such as benchmarks and monuments is authorized under NWP 18 within limitations. Activities necessary for the recovery of artifacts and information are not authorized by this NWP which is intended for authorization of survey activities only to ensure the minimal adverse effects limitation is not exceeded. Operations involving the use of explosives such as 3–D operations with blast shock during seismic tests, or mechanical landclearing activities, have not been categorically excluded. These activities are either unique to, or differ between, geographical regions of the Nation; therefore, regional conditions are the best way to address concerns about minimizing the effects of 3–D seismic surveying. Corps districts will be directed to coordinate with any Federal, state, or tribal authority expressing a concern about 3–D seismic surveying for the purpose of developing regional conditions to address those concerns, as appropriate. Of course, use of towed explosive, pneumatic or seismic devices that do not involve construction, excavation or other work in sediments do not require any permit from the Corps. We have conditioned this NWP to clarify that it does not authorize any permanent structures or fills. The current wording of the NWP does include, but is not limited to, the use of augers, shovels, backhoes, and other small equipment, as well as core drills. NWP 6 is reissued with the proposed changes and the clarification stated above.

7. Outfall Structures: The Corps proposed no changes to this NWP. A number of commenters objected to re-authorization of this NWP or stated that work in tidal wetlands or areas supporting anadromous fishes should be excluded. Commenters stated that outfalls have caused the loss of wetlands and may trap or entrain fish. Several commenters stated that the NWP should contain a requirement to include measures in the design to prevent such fish loss. One comment indicated that work in areas that may be contaminated should be excluded. Another stated that activities authorized by this NWP have significant adverse environmental effects.

Regional conditioning of the nationwide permit and the provisions for discretionary authority at the division and district levels will provide tools necessary to protect fish, wetlands, and water quality, and to address any other environmental effects that potentially are more than minimal.

One commenter requested elimination of the notification requirement when the construction of the outfall requires less than 25 cubic yards. Several commenters called for retaining the notification requirement.

The notification requirement will be retained to allow review of proposed projects for greater than minimal adverse environmental effects and impacts to navigation.

Several commenters stated that this permit violates section 404(e) of the Clean Water Act because the discharge structures may not be similar in size or in the material discharged. One commenter called for authorizing all intake structures under this NWP.

The activities authorized by this NWP are similar because they are similar in scope and purpose and are reviewed and approved pursuant to the National Pollutant Discharge Elimination System (NPDES) under section 402 of the Clean Water Act. The relationship of these projects to section 402 assists the Corps in arriving at a minimal adverse effects determination. The inclusion of all intake structures under the NWP would make such a determination not possible. NWP 7 is reissued without change.

8. Oil and Gas Structures: The Corps proposed minor changes to this nationwide permit to clarify that Corps review for taking discretionary authority is limited to the effects on navigation and national security. One commenter was concerned that work could occur in environmentally sensitive areas. Another commenter suggested that pipelines be excluded from use of this NWP. A few commenters believed that this NWP should not be reissued because of potential impacts associated with oil and gas exploration and that this NWP does not meet the ''similar in nature'' or ''minimum effects'' threshold of section 404(e) of the Clean Water Act. One commenter recommended that a PCN be required for this NWP. A few commenters believed that individual state 401 water quality certification should be required for these activities.

The Corps believes this NWP is very restrictive. The only structures that can be authorized under this NWP are those within areas leased by the Department of the Interior, Minerals Management Service. The general environmental concerns are addressed in the required NEPA documentation the Service must prepare prior to issuing a lease. Further, the Corps involvement is only to review impacts on navigation and national security as stated in 33 CFR 322.5(f). NWP 8 is reissued with the proposed clarifications.

9. Structures in Fleeting and Anchorage Areas: The Corps proposed no changes to this NWP. One commenter requested clarification of the term ''structures'' and the definition of ''fleeting and anchorage areas,'' and expressed concern for secondary impacts of vessel discharges, and impacts from shading submerged aquatic vegetation by the structures.

The NWP is specific to the purpose of moorage of vessels, thus structures will be small compared to the vessels. Fleeting and anchorage areas are determined by the U.S. Coast Guard and indicated on navigation charts. They are for concentrating vessels in an area that minimizes navigation impacts to other vessels while the former vessels wait for unloading cargo, etc. Shading impacts are not expected as these areas are usually in deep water and the structures and buoys seldom produce measurable shading. NWP 9 is reissued without change.

10. Mooring Buoys: The Corps did not propose changes to this NWP. One commenter expressed concerns about the limitations or specifications on the size or number of mooring buoys, and the environmental restrictions on location.

Comments regarding specific areas that should be excluded or other special restrictions that are needed to protect special areas such as shellfish beds or submerged aquatic vegetation should be dealt with by contacting the appropriate district and requesting the addition of regional conditions. Based on our experience, we do not anticipate that the mooring buoys and anchorage systems will have more than minimal adverse effects, either individually or cumulatively. NWP 10 is reissued without change.

11. Temporary Recreational Structures: The Corps proposed no changes to this NWP. A few commenters were concerned that the NWP may

cause removal of riparian vegetation and alter the nearby shore aquatic environment, and that the Corps should define ''temporary,'' ''small floating docks'' and ''seasonal''. A commenter requested that the NWP be expanded for certain commercial activities other than jet ski, parasailing, and similar rentals, provided the activity is of temporary duration.

We disagree with the approach of attempting to define national time limitations on temporary or seasonal structures because of the seasonal variations for different recreational activities from region to region. Regional conditions can be developed for the NWP and/or the District Engineer may use discretionary authority, on a case-by-case basis, if duration, structure size, or location require such action. Limiting the NWP to discrete events would greatly reduce its utility. This nationwide permit was proposed to authorize temporary recreational structures which overall would have only minimal adverse effects. Given this, and the discretionary authority provisions, the Corps believes that the NWP adequately balances the need for temporary recreational structures in waters of the United States, while protecting riparian and aquatic resources. NWP 11 is reissued without change.

12. Utility Line Backfill and Bedding: The Corps proposed rewording of this NWP to include discharge of dredged material from the trench excavation, and requested comments establishing limitations for special aquatic sites. A large number of comments addressed NWP 12. Based on the comments we received and the Corps internal evaluation of the implementation of NWP 12, we have made substantial changes to this permit. We have added a PCN review for four situations: for any activity that would be authorized under NWP 12 that involves more than 500 linear feet in waters of the United States; for any project that involves mechanized landclearing of forested areas; for any utility line that is placed parallel to a water of the United States; and for any activity involving authorization under section 10 of the Rivers and Harbors Act of 1899. We believe that these increased limitations will ensure that no more than minimal adverse effects to the aquatic environment will occur.

The comments were closely split between supporting issuance without changes and supporting issuance with limitations. Several commenters were opposed to reissuance based on environmental impacts. Many commenters, requesting limitations, made suggestions on those limits: 200 linear feet, 1,000 linear feet in forested wetlands, 6 inch diameter utility line, 0.33 and 0.5 of an acre. Some commenters suggested PCN procedures above particular limits: 6 inch diameter line, 0.5 of an acre. The allowed duration of side casting also received suggestions: no side casting, 14 days, 30 days. Work with a maximum width of 30 feet was suggested by two commenters.

The variation in wetland values across the nation dictates that a limitation, or threshold for PCN, not overly restrict use of the NWP or unnecessarily add administrative burden to any large geographic area. Potential impacts will vary with the construction methods. The acreage limitation presents the possibility that high value wetlands could suffer more adverse effect at less acreage than the limitation/PCN threshold, but low value or easily recovering wetlands would require unnecessary added administrative procedure when exceeding an acreage limitation/threshold. An acreage limit of 0.33 acres would allow a nearly 2½ mile long utility line trench that was one foot wide. This could be a minimal impact in some areas, but may require an individual permit in other geographic areas and/or wetland types or values.

Based on careful review of all the comments, we have determined that certain limitations should be established and that certain activities will require a Corps-only PCN. We have added section 10 to this permit to allow districts to authorize projects that cross navigable waters. To ensure the navigable capacity of such waters will not be adversely affected, we have also established a PCN for any authorization that involves work in section 10 waters. We have also explicitly stated that mechanized landclearing, including landclearing of forested wetlands, for overhead utility lines may be authorized under NWP 12. To ensure that only minimal adverse effects will occur, we have established a PCN requirement for any utility line that will require landclearing of forested wetlands. We have also included the requirement for a PCN whenever a utility line is placed parallel to a stream bed. Finally, in order to ensure that only minimal adverse effects will occur, we have established a PCN requirement for any use of NWP 12 that exceeds 500 linear feet in waters of the United States.

Several commenters recommended that stream crossings be allowed only if perpendicular to the stream. One commenter suggested that bank stabilization must occur by segments rather than at the completion of the entire project. Another stated that laying utility lines on bottoms of streams should be discouraged. Several recommended that alternative routes be examined more thoroughly. We have added several PCN requirements, including one for situations where a utility line is proposed to be placed parallel to a stream bed. Generally, utility lines are placed perpendicular to a stream and we are, with this notice, directing the Corps districts to critically evaluate any projects that may be proposed to be placed parallel to a water of the United States. Moreover, we believe that it should be an exceptional case where a district authorizes a utility line within, or within wetlands parallel to, a stream bed for more than 100 feet. With the added PCN review, by the Corps, for any project that should be subject to a generalized alternative analysis (i.e., more than simply adjusting the alignment slightly to ensure minimal adverse effects), the district will use its discretionary authority to require an IP.

Several commenters believe that this permit should not be used in combination with other permits (see additional discussion on stacking permits). This restriction would be too limiting for many projects that have minimal adverse effects for the entire project including utility lines. At times, utility lines are considered ''single and complete projects'' as they support existing developments but will also support other future development. We have added a PCN for any stacking of NWP 12 with any other NWP.

Several commenters appeared to be confused with the word ''subaqueous''. Two commenters suggested slightly different wordings and deleting ''subaqueous''. The term subaqueous referred to below the surface of the ground (wetland) or water surface; a line laid on the surface does not require a section 404 permit but any mechanized landclearing to lay such a line would. We have dropped ''subaqueous'' as we feel the reference is not needed and confusing. One commenter desired authorizing maintenance of landclearing. Most maintenance consists of cutting the wetland vegetation above the soil, which is not regulated under section 404 when the soil is not disturbed. If maintenance of a utility line corridor involves landclearing as defined in 33 CFR 323.2(d)(1), it would require additional authorization.

One commenter was confused about the ''single and complete project'' requirement for an NWP combined with an individual permit in relation to the required section 10 permit for utility

lines crossing navigable waters. The NWP authorization covers the excavation and backfill portion in conjunction with the remaining single and complete portion of the line that continues beyond the navigable water, usually in wetlands. ''Single and complete'' for a linear project under the NWPs is defined at 33 CFR 330.2(i); briefly, a linear project is single and complete at each widely separate water crossing. Also, the navigable water portion of the structure (utility line) required a permit under section 10 because it was not included in NWP 12 authorization. Although we have added section 10 to NWP 12, the single and complete provision for linear projects remains in effect.

In the past, NWP 12 has not included Section 10 authorization, which has added an individual permit procedure (usually a Letter of Permission) to the authorization of a utility line in navigable waters. The Corps has decided to add section 10 authorization to minimize the administrative procedures and decrease the time needed for authorization. However, we are requiring a PCN for review of navigation impacts and requiring procedures for notifying the National Oceanic Atmospheric Administration for charting the utility line to protect navigation.

A few commenters were confused by the term ''parallels a water.'' The Corps had suggested, in the proposal, that care should be taken during the placement of a utility line parallel to a waterbody. We are concerned with the potential adverse effects associated with the placement of a utility line parallel to a waterbody and, therefore, have modified and clarified this language. We have removed the proposed language and have added a PCN requirement for the placement of a utility line within a water of the United States parallel to a stream and have clarified that ''parallel to a stream'' means installation of a utility line lengthwise to the bed of the stream. Furthermore, we have added a PCN requirement for proposed projects that would involve placing utility lines along stream beds (see discussion above). Two commenters suggested clarifying whether the NWP included discharges for access roads and foundations for structures supporting overhead transmission lines. Structural fills for overhead utility line supports are often permitted by NWP 25. Access roads could be authorized by NWP 14 or 26 in some cases. The Corps has clarified that mechanized landclearing is authorized for overhead utility lines as long as the width is kept to the minimum necessary. Furthermore, as discussed above, we have added a Corps-only PCN for landclearing forested areas. Access roads and foundations for overhead lines are not authorized. NWP 12 is reissued with modifications as discussed above.

13. Bank Stabilization: The Corps proposed no changes to this NWP. Two commenters wanted to keep the current language of the nationwide permit with no changes, while another expressed general support. Several commenters objected to limitations on length of project area or quantities of fill, particularly for flood control structures. A few commenters stated that the limitation of one cubic yard of fill per linear foot should not include any earthen backfill to return the bank to a former footprint, and that the limitation should apply only to fills that encroach into the pre-existing waterway. Their reasoning is that this would allow reconstruction of failed levees and road embankments and would not result in a loss of wetlands or jurisdiction relative to the pre-failure condition. These commenters also note that the prohibition of any fill in any special aquatic site is a restriction that unduly constrains projects and often renders this NWP inapplicable. They recommend that impacts to special aquatic sites of up to 0.1 acres be allowed without notification, and that greater acreage be allowed with notification. These commenters further recommend that use of biotechnological slope protection or other methods relying on vegetative stabilization be allowed greater PCN thresholds to encourage such usage.

We believe expansion of the scope of this NWP would result in a potential for more than minimal adverse effects. The permit is designed specifically for the protection of existing bank lines at the time of protection and does not authorize filling to restore the original bank line or any other intermediate alignment of the bank. Adjustment in the alignment of the bank is allowed only for reasonable and practical design and construction considerations within the limitations of NWP 13.

Two commenters recommended removing the special aquatic site restriction for ephemeral watercourses when there is no flow under the premise that such areas are defined as wetlands under a broad definition. These commenters also recommend that the nationwide permit recognize that there is likely to be a construction zone 30 feet or greater along the bank within jurisdictional areas where project impacts will be incurred for installation of bank protection.

We disagree that wetlands in ephemeral systems are necessarily of lesser value than other waters simply because they do not contain water at all times of the year. Therefore, removal of special aquatic site restrictions is not warranted. We do recognize that certain bank stabilization projects necessitate keying in the toe of the slope to ensure adequate protection, and that such work requires a construction footprint that will impact additional areas beyond the waters of the United States. If any such adverse effects are likely to be more than minimal for a particular waterbody, the Corps will add regional conditions to ensure that only minimal adverse effects will occur.

One commenter stated that notification is an unnecessary level of Federal review, and that it usurps the states' authority to assess site-specific impacts to water quality under section 401.

This is not an expansion of authority because notification has been a condition of this nationwide permit since its last re-authorization in January 1991. Likewise, it does not usurp the authorities of the states pursuant to section 401 of the Clean Water Act. A state may condition its 401 water quality certification for this NWP so that it will review projects over 500 feet in length, and issue or deny site-specific section 401 certification.

Many commenters were opposed to the reissuance of this nationwide permit because they perceived it to be used in ways inappropriate to its intended use, such as a precursor to channelization of watercourses. Specifically, they suggested that permittees might use this nationwide permit to construct flood control works, and how riprapping affects existing hydrology with adverse effects on habitat and adjoining properties. Several commenters stated that this nationwide permit should specifically exclude channelization, noting that bank stabilization projects can adversely affect habitats adjacent to jurisdictional waters that may support plant or animal populations that are equally limited. We agree that channelization is an inappropriate use of this nationwide permit. It is the responsibility of each district to determine whether a particular project is contributing to greater than minimal cumulative adverse effects, and to exercise discretionary authority if they believe such effects are occurring.

Several commenters noted that this nationwide permit should be used selectively on a regional or watershed basis to prevent cumulative adverse effects in sensitive habitats. Others stated that this nationwide permit needs

better monitoring and compensatory mitigation, or should always require compensatory mitigation. One commenter stated that this nationwide permit should not be used in conjunction with any other nationwide permit.

We believe the provisions for regional conditioning and asserting discretionary authority will ensure that greater than minimal adverse effects do not occur. Mitigation is being required where appropriate to achieve minimal adverse effects, but we do not believe that all bank stabilization projects require mitigation because many projects have minimal effects, in fact often positive effects, on aquatic resources without mitigation. For example, riprap on an eroding barren bank will typically increase habitat diversity and reduce turbidity in downstream waters.

One commenter stated that because erosion has occurred after some projects permitted under this nationwide permit were constructed, the Corps should not reissue it unless it can demonstrate that such projects will perform as expected. Another commenter noted how some projects of inadequate design integrity would eventually wash downstream with potentially adverse effects on water quality, aquatic habitat, public safety, and aesthetics.

The Corps evaluates projects to determine if they are in compliance with Clean Water Act requirements, including whether the project will only result in minimal adverse effects for NWPs, and to ensure that they are not contrary to public health or safety. We believe that the bank stabilization methods employed are generally effective even in cases where there is no reporting to the Corps. Although a washout of shore protection could occur, such unusual flows would also wash out unprotected shorelines and structures or natural features such as trees, rocks, and the like, all of which would wash downstream.

One commenter questioned whether this nationwide permit could be used in lieu of NWP 2 for stabilization projects in artificial canals. Another commenter recommended that this nationwide permit should be used only on artificial canals.

NWP 13 can be used in lieu of NWP 2 where appropriate. However, restricting its use only to artificial canals would unduly restrict its utility.

Several commenters recommended retaining the notification requirements, particularly for those projects in excess of 500 linear feet. Several commenters called for lowering the PCN threshold to 100, 200 or 300 feet to more appropriately address cumulative impacts. One commenter suggested that the cubic yardage limit for notification be 100,000 cubic yards. Several commenters stated that the nationwide permit should specifically mention the types of bank stabilization allowed, with an emphasis on methods that did not include landscaping. Many others recommended excluding certain materials such as gravel, asphalt, tires, automobiles, building rubble, poured concrete, driven sheet piles, and structural timber bulkheads. Two commenters stated that projects authorized under this nationwide permit should not include seawalls or bulkheads on open or natural shorelines and should not allow backfilling for the purpose of creating fast land or reclamation. Three commenters stated that use of concrete rubble should only be used if it meets acceptable riprap standards for size and density, is free of contaminants, is faced with acceptable rock riprap, and has all rebar cut flush with the surface.

We believe the terms and conditions that prohibit discharges in special aquatic sites (including wetlands) prohibit the use of unsuitable and toxic materials, limit the shore stabilization to 1 cubic yard per linear foot, and require that the proposed stabilization be the minimum necessary, are sufficient to alleviate these concerns. In some cases where the adverse effects could be more than minimal (i.e., discharges on more than 500 feet of shoreline, and/or greater than one cubic yard per linear foot of shoreline) notification to the DE is required. Also, where potentially high value aquatic resources may be impacted with less than 500 feet of bank protection, the Corps division can regionally condition NWP 13. The intent is to accommodate a wide range of users, techniques and materials with minimal time delay and maximum protection of valuable wetland resources. NWP 13 is reissued without change.

14. Road Crossing: The Corps proposed no changes to this NWP. Many commenters suggested that this NWP should not be reissued or should be modified for a number of reasons including the following: it should not be used for large road projects with multiple wetland crossings; the breadth of the road crossings are not constrained; the acreage allowance should be reduced; and this NWP is most frequently stacked with other NWPs, causing adverse effects to exceed minimal. A few commenters recommended that a maximum acreage impact limit be applied to large road projects with multiple crossings of waters of the United States (including wetlands and other special aquatic sites).

The Corps regulatory policy regarding linear projects and what constitutes a single and complete crossing is well established (RGL 88–6). Individual channels in a braided stream or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies. For linear projects, the single and complete project requirement for individual NWPs will be applied to a waterbody at a single location. That is, each waterbody impacted by a roadway will be considered a single and complete crossing at that location. Where a roadway intersects a single waterbody such as a meandering river at separate but distinct locations, each crossing is considered a single and complete crossing. The purpose of the ''single and complete'' language is to preclude situations where one project will repeatedly crisscross one waterbody when such multiple crossings can be practicably avoided.

Several commenters expressed support for this NWP as proposed. Others indicated that there should be no limits on the length or area of a crossing. Two commenters suggested that the NWP 26, 1 to 10 acre provision be incorporated and that acreage be the only controlling limit. Two other commenters recommended the length be increased to 400 linear feet and one suggested that the acreage be increased to acre. A few commenters opposed the inclusion of the ''Notification'' general condition in this NWP.

We carefully considered the suggestions to limit the width of the roadway as well as to expand the length and maximum acreage for the roadway. We concluded, however, that the limits in the NWP as proposed represent a tested balance. With regard to stacking NWP 14 with other NWPs, we have conditioned this NWP to not allow NWP 18 or NWP 26 to be combined with it for the purpose of expanding the allowable road crossing footprint. In addition, a Corps-only PCN is required any time this NWP is combined with any other NWP. (See discussion on ''Stacking of NWPs'' in section II above.). NWP 14 is reissued with the modification discussed above.

15. U.S. Coast Guard Approved Bridges: The Corps proposed no changes to this NWP. A few commenters expressed concerns about the impacts associated with the construction of access fills, fill removal, and restoration of preconstruction grades. Another commenter was concerned about revegetation with native species after completion of such preconstruction

grade restoration activities. One commenter encouraged inclusion of conditions to require excavation and removal of old approach fills when they have been replaced. Another commenter stated that the impacts related to Coast Guard bridges can be significant and that issuance of the NWP contributes to an incomplete and less than thorough review by the Coast Guard. A few commenters felt that the Corps had inappropriately delegated Section 404 responsibility to another agency.

Based on the requirement of this NWP and the ability of the DE to assert discretionary authority should the nature of the impacts warrant, we believe that this NWP is an efficient means to regulate the construction of bridges. The regulations also allow for the development and inclusion of conditions to address particular project aspects such as removal of old approach fills, revegetation specifications, etc. The comments regarding the delegation of regulatory authority are apparently based on the misinterpretation of the permit language. The Coast Guard has been given the task of reviewing such bridge construction pursuant to section 9 of the Rivers and Harbors Act of 1899. A Department of the Army permit pursuant to section 404 of the Clean Water Act is still required for the discharge of dredged or fill material into waters of the United States associated with the construction of the proposed bridges and causeways. NWP 15 is reissued without change.

16. Return Water From Upland Contained Disposal Areas: The only change the Corps proposed to this NWP was a change in wording to note that, in certain circumstances, dredging may now require a section 404 permit. One commenter requested that the NWP require an NPDES permit. A couple of commenters recommended that the NWP not be applicable to dredged material taken from areas of known sediment contamination or where there is reason to believe that the discharge is contaminated. A few commenters stated that water quality violations could result from the NWP unless it is limited to the activities authorized by, and operating in conformance with, currently valid permits or exemptions. One commenter suggested that all return water be tested for contaminants. A couple of commenters thought that the original text and the clarification were unclear without specifying when the activity may require a section 404 permit relative to the excavation rule, or when a section 10 permit may be required.

This NWP authorizes the return of effluent to waters of the United States from upland contained disposal areas, and is not intended to address the dredging activity. However, a Department of the Army permit pursuant to section 10 is required for structures or work in, or affecting, navigable waters of the United States, as that term is defined in 33 CFR parts 322 and 329. A Section 404 permit is required for any addition or redeposition of dredged material associated with any activity that destroys or degrades a water of the United States as defined in parts 323 and 328, unless the discharger demonstrates to the satisfaction of the Corps or EPA, as appropriate, prior to the discharge, that the activity will not have such an effect. The effluent subject to NWP 16 has been administratively defined as a discharge of dredged material. Based upon Corps experience and knowledge of dredging and disposal operations, we believe that the technology is readily available to control the quality of the return water from contained upland disposal sites. Any adverse environmental effects resulting from this type of activity would be minimal, provided the effluent meets established water quality standards and adequate monitoring of the activity is performed to assure compliance with these standards. With this in mind, it is our intent to provide the states an opportunity to review each activity under this NWP authorization to assure compliance with state water quality standards. We see no need to require additional state review unless the water quality certification for the NWP has been denied. The prospective permittee must receive an individual certification or waiver from states that have denied water quality certification for the NWP authorization. The Corps has no authority to determine NPDES program requirements. NWP 16 is reissued with the proposed changes.

17. Hydropower Projects: The Corps proposed no changes to this NWP. The comments received addressing NWP 17 were all related to the potential impacts associated with hydropower projects and stated the position that NWP 17 is contrary to the NWP program's provision allowing only activities of similar nature and of minimal impacts.

We are maintaining the notification requirement for this NWP to enable us to assess the nature of the impacts associated with each project and whether to exert discretionary authority. In addition, the Federal Energy Regulatory Commission has the responsibility of examining environmental impacts for those small hydropower projects at existing reservoirs. NWP 17 is reissued without change.

18. Minor Discharges: The Corps proposed a modification to the wording of this NWP to clarify how the Corps measures excavation activities for the purpose of determining compliance with the NWP. This was based on existing guidance developed after the Corps revised the definition of ''discharge of dredged material'' at 33 CFR 323.2(d) to clarify when the Corps regulates incidental discharges of dredged material associated with excavation activities. (See August 25, 1993, **Federal Register**, 58 FR 45008.) Based on this existing procedure, this clarification does not affect the number and type of activities that are regulated under this NWP. When measuring the quantity of the discharge of dredged or fill material, the Corps will include the volume of any excavated area (i.e., the volume of the substrate excavated) which is below the plane of the ordinary high water mark (OHWM) or high tide line (HTL). Many commenters expressed uncertainty regarding how to measure the 25 cubic yards of discharge authorized by this NWP. Some commenters requested that the allowable area of impact be increased to 2/10 acres. The Corps continues to believe that the current volume and acreage limits are, and have proven to be, appropriate to ensure that the adverse effects are no more than minimal for the purpose of authorization by this NWP and is not changing those limits. We are providing the following guidance to clarify how NWP 18 quantities are measured.

How to determine quantities under NWP 18: NWP 18 applies to all waters of the United States. For projects that are;

Below and waterward of the OHWM or HTL:

Volume: The cubic yardage of any dredged or fill material placed; plus,

The cubic yardage of the substrate excavated.

Acreage: The acreage of any areas that are filled, excavated, flooded and drained.

Landward of the OHWM or HTL:

Volume: Not applicable. Only acreage limits apply.

Acreage: The acreage of any areas that are filled, excavated, flooded and drained.

For projects that are both below and waterward of the OHWM or HTL and that are landward of the OHWM or HTL, the acreage is the sum of the two acreages as determined above, while the volume is that measured below and waterward of the OHWM or HTL. For example, a permittee may place 50

cubic yards in a wetland landward of the OHWM provided the fill does not exceed 1/10 of an acre and the District Engineer determines that the impacts are minimal. In this example, there was no material placed below and waterward of the OHWM or HTL, therefore the cubic yard (volume) limit was zero and not exceeded. Furthermore, the total acreage was less than 1/10 acres. NWP 18 may be combined with NWP 19 to authorize activities in navigable waters of the United States (i.e., Section 10 waters). NWP 18 is issued as proposed.

19. Minor Dredging: The Corps proposed a modification to this NWP to authorize, under section 404 of the Clean Water Act, the incidental discharges associated with the dredging activities in navigable waters of the United States. This was necessary after the Corps revised the definition of ''discharge of dredged material'' at 33 CFR 323.2(d) to clarify when the Corps regulates incidental discharges of dredged material associated with excavation activities. (See August 25, 1993, **Federal Register**, 58 FR 45008.) This clarification does not affect the number and type of activities that are regulated under this NWP. Many commenters supported keeping the quantity limit at the existing level. We agree and continue to believe that the 25 cubic yard limit is acceptable. We have allowed and will continue to allow NWPs 18 and 19 to be used for the same project in section 10 navigable waters of the United States. NWP 19 cannot be used in section 404-only waters. We believe that the requirement of NWP 19 that prohibits excavation in wetlands, coral reefs, sites supporting submerged aquatic vegetation, and anadromous fish spawning areas, and the requirement of NWP 18 that requires notification in special aquatic sites, including wetlands, and the requirement of NWP 18 that requires notification in excess of 10 cubic yards, will ensure that impacts resulting from these activities will be minimal. For example no more than 35 cubic yards could be excavated from navigable waters of the United States without a notification to the Corps. Furthermore, no activity between 35 and 50 cubic yards of combined excavation and discharge could occur without a notification to the Corps and a Corps determination that the adverse effects would be minimal. NWP 19 is issued as proposed.

20. Oil Spill Cleanup: The Corps proposed no changes to this NWP. One commenter suggested a regional condition to require that activities be conducted in conformance with the National Response Team Integrated Contingency Plan Guidance. Even though this guidance is used to assist an applicant to develop one plan to satisfy several applicable laws, it is strictly voluntary on the applicant's part to develop one consolidated response plan. The Corps believes it is most important to verify that the response is conducted in accordance with the Spill Control and Countermeasure Plan required by 40 CFR 112.3 and any existing state contingency plan, and that the regional response team (if one exists) concurs with the proposed containment and cleanup effort. This NWP authorizes the structures and fills used to effect the oil spill cleanup. Other Federal and state agencies have lead responsibility to administer oil pollution laws. NWP 20 is reissued without change.

21. Surface Coal Mining Activities: The Corps proposed the consideration of expanding this NWP for mining activities on previously mined lands that have not been subject to restoration. Several comments supported the proposed inclusion of previously mined areas and a few expressed opposition. Some commenters stated that this proposal should not apply to wetlands restored under the Surface Mining Control and Reclamation Act (SMCRA) of 1977 or NWP 27. Another commenter questioned whether the NWP applies to pre-1977 SMCRA. Comments about mitigation presented a wide range of possibilities: Support for on-site mitigation after completion of mining; mitigation ratio should be set at 1:1 on-site as proposed; flexibility is needed to apply mitigation on-site and/or off-site; and mitigate off-site before mining begins; mitigate concurrent with mining. One commenter stated that restricting the mitigation to on-site would economically stop a mining operation. Many commenters opposed the bond, stating that this is already required by the SMCRA and at least some state agencies.

The remining of abandoned areas requires application under Title V of the SMCRA. As with new mining, the Office of Surface Mining (OSM) coordinates such proposals with the Federal and state resource agencies and determines whether or what mitigation is required. The Corps has decided that specific language referencing remining abandoned mines is not required within the nationwide permit text. The NWP, as worded, will allow remining of abandoned mines. The Corps will strongly encourage remining of abandoned mines where the wetlands are of low value, rather than mining new areas with wetlands that were not previously disturbed. The Corps will review the Title V application for compliance with the NWP. The Corps will only require a bond for mitigation when OSM or the state agency has not required a bond. Requiring a bond in certain cases is consistent with existing policy. (See 33 CFR 325.4).

One commenter expressed concern over the area impacted (i.e., ancillary activities). The NWP specifically applies only to the coal excavation area. Additionally, any facilities, such as buildings, to be placed in waters of the United States would require separate authorization by the Corps.

Several commenters desired restrictions such as set-backs, no stream relocations, no impacts to wetlands which would be difficult to replace, and acreage limits. Another requested an exemption from mitigation for certain chemical compositions of the wetland soil. We believe that each case will be so specific that it is best reviewed case-by-case.

A couple of commenters stated that the Corps was delegating its authority to the OSM and that this NWP did not comply with section 404(e). Minimizing duplication of Federal regulation is one of the goals of the President's Wetland Plan and is one of the principal purposes of NWP 21. We believe that the Corps should not duplicate the intensive review performed by OSM in coordination with other Federal and state resource agencies. OSM complies with the same Federal environmental laws, such as National Environmental Policy Act, Fish and Wildlife Coordination Act, Endangered Species Act, and National Historic Preservation Act as the Corps does in executing its regulatory program. The Corps reviews the Title V information to assure that the impact analysis and mitigation are in compliance with the Corps policy and regulations. The NWP authorization is not valid until the mining activity has been authorized by OSM or by a state with an approved Title V program. To assure that the Corps receives a complete application, we have revised the NWP to include a requirement for an OSM or state-approved mitigation plan. NWP 21 is reissued with the modifications described above.

22. Removal of Vessels: The Corps proposed no changes to this NWP. However, a few commenters requested that the term ''minor fills'' be the same as that for Nationwide Permit 18, and one commenter requested that this NWP require a PCN that would specifically require contacting the State Historic Preservation Officer (SHPO) to ensure against damage to vessels potentially eligible for listing in the National Register. Another commenter requested

notification to the SHPO since the Abandoned Shipwreck Act gives states title to, and management authority of, certain shipwrecks.

The criteria described in Nationwide Permit 18 for minor discharges of dredged or fill material could be used as a guide in evaluating the environmental impacts, but is not meant to be a definition of ''minor fill''. This term is intended to be subject to the DE's interpretation on a case-by-case basis as a project is being evaluated. The existing language of NWP 22 does not allow its use for any ship or vessel that is listed or eligible for listing unless the district determines that the activity complies with the National Historic Preservation Act. The Corps will, in any particular case, coordinate with the SHPO regarding historic properties, including concerns with regard to the Abandoned Shipwreck Act. We believe that the restrictions within this NWP in conjunction with General Condition 12 and the Corps regulations at 33 CFR 330.4(g), are sufficient to protect against damage to historic properties. NWP 22 is reissued with no changes.

23. Approved Categorical Exclusions: The Corps proposed no changes to this NWP. A few commenters supported expansion of Nationwide Permit 23 to cover state environmental program approvals, especially for flood control work, and all emergency work by a public agency.

State programs are not required to comply with NEPA and states have varying environmental protection programs. Therefore, the Corps cannot base a nationwide permit on state approvals as NEPA Categorical Exclusions (CE). Regional and programmatic general permits are effective tools that can be developed at the district level for state programs that meet or exceed the Federal CWA requirements. Emergency work can normally be authorized under other nationwide permits such as NWP 3 and 37, or the Corps emergency permit authority.

A few commenters requested the NWP be regionalized with regional conditions and asked that districts publish public notices for proposed CEs and lists of approved CEs. The Division Engineers have the authority to add regional conditions to any nationwide permit and are currently in the process of considering recommendations for conditions on these nationwide permits. All CEs are available in the **Federal Register** and we intend to make them available on our Internet homepage which is currently being developed.

A number of commenters opposed continuation of the existing nationwide permit. They stated that the permit is often misused, especially by the Highway Departments. Most of these commenters called for revision of NWP 23 to require periodic review (every 5 years at the renewal of the general permit) and assessment of approved CEs (citing new knowledge and outdated agency Environmental Assessments), limits on the area of wetlands that may be impacted (similar to Nationwide Permit 26), and limiting (to 25–50 feet) or excluding stream channelization. Some commenters called for excluding bridges and culverts in those streams that support fish, and excluding stacked concrete slabs that create low water dams.

The Corps does, upon being furnished a notice of an agency's CE, solicit public comment, and review the CE for approval for authorization by this nationwide permit. We may include conditions for authorization as a part of that approval. This is an ongoing process and the U.S. Coast Guard has recently updated their CEs and requested approval for authorization under the NWP. RGL 96–1 has already been issued for Coast Guard CEs and we will soon publish our findings and determinations in the **Federal Register**. We will continue to monitor the CEs approved for authorization under this nationwide permit and make adjustments through changes in conditions, new approvals, and removal of previously approved CEs when warranted. General Condition 4 prohibits substantial disruption of movement of aquatic life species indigenous to the waterbody.

Some commenters called for not renewing Nationwide Permit 23 due to misuse, violations of 404(e), and illegal delegation to other agencies of the Corps determination of which projects are subject to Clean Water Act review.

We believe the Corps current review process of the lead agency's decision ensures that the CE is not misapplied. The Corps does not necessarily approve all of an agency's CEs. Only those consistent with the NWP program are approved. Furthermore, in the recent action on the Coast Guard CEs, the Corps requires a PCN for some actions with the potential to result in more than minimal impacts.

One commenter requested that we require a cultural resources inventory before approving CEs.

Compliance with cultural resource requirements is the responsibility of the lead Federal agency. CEs are developed in accordance with NEPA. All other Federal environmental laws and regulations, including the cultural resource and historic preservation laws, must still be satisfied by the agency proposing the CE. NWP 23 is reissued without change.

24. State Administered Section 404 Programs: The Corps proposed no changes to this NWP and the only commenter providing comments specific to the permit expressed support for this nationwide permit as written. NWP 24 is reissued without change.

25. Structural Discharge: Corps proposed clarification that this NWP may be utilized for general navigation purposes. A few commenters recommended issuance of this NWP as proposed. One commenter stated that this NWP should not be reissued because it has not been demonstrated that the adverse environmental effects are only minimal, and that individual permits provide greater protection to environmental resources. We believe the impacts resulting from the portion of these projects regulated by the Corps are typically very small and localized. Any project can be further conditioned to ensure that adverse effects are minimal or mitigated appropriately, if necessary. If it is determined that any particular project would not qualify for this NWP because adverse effects are not minimal, the DE can exercise discretionary authority and instruct the applicant on the procedures to seek authorization under an IP.

One commenter requested clarification of the significance of changing the previously worded ''piers and docks'' to ''mooring cells''. Another commenter stated that ''docks and piers'' should be specifically included, noting the current authorization does include such wording.

We recognize that piers and docks are not mentioned in this NWP; however, they would be covered if their construction methods entailed discharge of material into tightly sealed forms or cells. We do not feel it necessary to specifically include piers and docks, because their construction often requires driving piles, which typically does not require a Section 404 permit. The structure itself may require a Section 10 permit if located in navigable waters of the United States.

One commenter stated that this NWP should include well pads for monitoring, and surveillance wells used for monitoring pollutants and groundwater parameters of aquifers.

We do not believe it is necessary or appropriate to include such uses under this NWP, because Nationwide Permit 18, covering Minor Discharges, would be more suitable.

One commenter noted that this NWP does not propose any limitations. Several others recommended limitations

on this NWP, including no more than 20 mooring cells, size thresholds such as less than 8,000 square feet for pile-supported structures, or spacing between piles of at least six feet. Two commenters stated that this NWP should authorize the side-casting of material for placement of the forms or construction of pile caps. One commenter stated that mechanized landclearing for access to the project site for the placement of structural members should be authorized by this NWP. One commenter recommended that this NWP specifically not authorize river boat mooring cells for gambling purposes.

We believe that the actual footprint of project impacts typical of the types discussed in the NWP are limited sufficiently such that further limitations are not necessary. However, each district may implement special conditions or regional general conditions on a case-by-case basis as deemed necessary. We agree that side-casting of material for construction of pile caps is appropriate provided it is kept to the minimum necessary, that material is not placed in such a manner that it is dispersed by currents or other forces, and that preconstruction contours are maintained. However, we do not believe that mechanized landclearing to access the project site should be authorized under this NWP. Finally, we do not see the significance of differentiating between mooring cells used for general navigation purposes versus those that may be used for mooring of gambling vessels. NWP 25 is reissued with the proposed clarification.

26. Headwaters and Isolated Waters Discharges: The Corps proposed two options to change the previous thresholds associated with this NWP and committed to regional conditioning of the NWP to ensure minimal adverse effects. Numerous comments were received and are addressed by categories in the following text. Based on the recommendations from the public and other agencies, as well as the Corps internal review of implementation of NWP 26 over the past 5 years, we have made substantial changes to the permit. We have reduced the thresholds of NWP 26 to ⅓ and 3 acres, added a limitation for linear waterbodies of 500 linear feet, and stated that we believe that most projects above ⅓ acre will result in mitigation requirements to offset adverse effects to the aquatic environment. We believe that these additional limitations that we have placed on NWP 26 will greatly improve the environmental protection afforded by Corps review of projects under this NWP and will better ensure that no more than minimal adverse effects will occur. In addition to the substantial limitations that we have placed within the terms and limitations of the NWP 26 at the national level, we are directing our districts to carefully evaluate the aquatic systems in their districts and, working with the Corps divisions and the other Federal and state agencies, add additional limitations as necessary for added protection of the aquatic environment. These changes are detailed below in our discussion of the comments we received.

General: More than 500 commenters provided comments specifically addressing NWP 26. Numerous commenters expressed opposition to NWP 26, expressing concern that NWP 26 authorizes activities that are not similar in nature and activities that have greater than minimal impacts both individually and cumulatively, concluding that NWP 26, in many cases, is therefore, ''illegal''. Many of these commenters believe that the NWP should be deleted while many acknowledge a necessity for such a nationwide permit, but feel that the NWP must be modified to respond to the growing concerns for the potential cumulative effects resulting from activities authorized by this permit.

Many of these commenters also expressed concern that wetlands impacted by NWP 26 (those above headwaters and isolated wetlands) are as valuable, if not more so, than other wetlands to which NWP 26 does not apply. These commenters state that there is no scientific evidence that supports the concept that these wetlands are of less value and refer to a 1995 National Academy of Sciences' National Research Council Report, which states: ''the scientific basis for policies that attribute less importance to headwater areas and isolated wetlands than to other wetlands is weak.'' Some of these commenters also commented that there is no scientific basis for the threshold limits.

Numerous commenters expressed the view that the NWP has worked well, that there is no evidence to indicate that it is resulting in more than minimal adverse effects and that the loss or further limiting of NWP 26 would result in increased regulatory burdens on the public, less regulatory certainty, unacceptable work load increases for the Corps, increased processing times, project delays, and an overall lessening of the regulatory program's ability to protect waters of the United States.

The Corps proposed 3 options for acreage limits that would define when a PCN must be submitted. These options were:

Option 1: 1 to 10 Acres (no change)
Option 2: ½ to 5 acres
Option 3: ⅓ to 3 acres

Thresholds: Approximately 70% of the more than 400 comment letters on these threshold options expressed a preference for Option 1, no change in the thresholds of 1 and 10 acres.

Many of these commenters suggested that a lowering of the thresholds would result in a lessening of the practice by developers of minimizing their wetland fills to fit under the thresholds because the thresholds would be too low to meet. The result then being, that they would be forced into the PCN or individual permit process and would apply for non-minimized fills. Many commenters also estimated that the Corps work load would increase significantly, thus causing the Corps to be less effective in its mission to protect wetlands. A few commenters believed that in those cases where mitigation is required for all fills (often a state or county requirement), that the effect of causing developers to reduce fill areas to even smaller fills (by lowering the threshold to 1/3 of an acre) could be more, smaller mitigation sites.

A few commenters preferred changing the thresholds to option 2.

Approximately 30% of those commenting on this subject preferred option 3, (⅓ & 3 acres). Most of these commenters expressed the view that the current thresholds are allowing more than minimal adverse effects and that the lower levels would better assure that the NWP would not result in more than minimal adverse effects.

A few commenters recommended that the thresholds be increased to enhance flexibility and program efficiencies.

The Corps acknowledges the concerns, expressed principally by natural resource agencies and environmental groups, for the potential level of adverse effects resulting from NWP 26 in its present form. The Corps also acknowledges the concerns of the regulated public for the potential lessening of regulatory certainty and flexibility in the program through further limitation of the scope of NWP 26.

The Corps agrees that the level of cumulative adverse effects under NWP 26 must be reduced and more effectively mitigated. We will later discuss the manner in which the Corps has addressed the concerns regarding impacts to the aquatic environment. We also believe it is important to understand the history and derivation of the Corps NWP program.

In 1977, the Corps developed the headwaters and isolated waters

nationwide permit (NWP 26) as we extended section 404 jurisdiction to all waters of the United States (including isolated and headwaters areas). Prior to 1977, the Corps did not require Section 404 permits for discharges of dredged or fill material into waters in these geographic areas. Over the past 19 years NWP 26 has been revised in an attempt to ensure that activities are not authorized under NWP 26 if such activities would result in more than minimal adverse effects, either individually or cumulatively, to the waters of the United States, including wetlands. While the Corps had to assure compliance with this statutory requirement (Clean Water Act section 404(e)), it also had to consider the environmental and programmatic implications of an extremely heavy regulatory workload.

The most recent data and scientific literature indicate that isolated and headwater wetlands often play an ecological role that is as important as other types of wetlands in protecting water quality, reducing flood flows, and providing habitat for many species of fish and wildlife. For example, in many parts of the Nation, isolated and headwater wetlands comprise a significant portion of the functioning wetlands that remain in existence. As previously noted, the National Academy of Sciences concluded in its 1995 report on wetlands that there is no scientific basis for policies that attribute less importance to headwater areas and isolated wetlands than to other wetlands.

In light of our internal evaluation of NWP 26, and a careful consideration of all comments regarding its reissuance, we have determined that a modified approach to NWP 26 and eventual replacement of NWP 26 is necessary in order to ensure that in the future no more than minimal adverse effects occur to the waters of the United States, both individually and cumulatively. This determination is supported fully by the majority of comments from the public and other Federal and state resource agencies. Therefore, NWP 26 will be immediately modified and eventually replaced with a new approach to authorizing activities with minimal adverse effects. This new approach will take into account the Corps workload and a desire to reduce unnecessary regulatory burdens.

The approach that we are implementing today will ensure that only activities resulting in minimal adverse effects go forward under NWP 26, while maintaining flexibility and expedited permitting for applicants proposing such projects. Based on the desire to develop a more specific data base on the specific types of activities authorized under NWP 26 and an improved data base on impacts of projects authorized under NWP 26, we have determined that a phased approach to NWP 26 is necessary. In this regard, we are, with this notice, issuing a modified NWP 26 for a period of two years rather than the normal 5 year period for all other nationwide permits. During this two year period, which starts with today's date, the Corps will collect additional data on the types of activities regulated and develop, propose, and issue new nationwide permits to replace the revised NWP 26. Although we recognize the ecological importance of isolated and headwater wetlands and the potential for impacts to these resources by NWP 26, we believe it is necessary to reissue NWP 26, in its more restrictive and environmentally sensitive form, during the two year phase out period to ensure fairness to the regulated public and to allow for development of activity specific replacement NWPs. The replacement permits, which will be activity specific, will be published for public review and comment approximately 18 months from today (approximately May 1998). The Corps is entering this initiative with a completely open view to the final outcome and would welcome any comments from the public over the next six months regarding specific categories of activities that should be considered for new nationwide permits. Such comments should be directed to the address listed in the ADDRESS section of this notice. For example, NWP 29 is an activity-based NWP for single family residences with a ½ acre fill limitation. Another example could be fills associated with the expansion of existing commercial developments, with acreage limit specific conditions, and a PCN to evaluate the potential for more than minimal impacts. In taking this approach, the Corps will evaluate the types of activities that are currently authorized under NWP 26 and identify appropriate limitations for the activity-specific NWPs to ensure that the ''minimal adverse effects'' requirement of section 404 (e) is met. It is also important to note that the public will have an opportunity to formally comment on the proposed replacement permits once they are officially proposed in approximately 18 months.

During the two year period that may be required to issue activity-specific permits to replace NWP 26, we believe that certain modifications to NWP 26 are necessary. Thus, we are changing the threshold limits to ⅓ and 3 acres. Using these thresholds, the maximum fill allowable under NWP 26 will be 3 acres. Discharges over ⅓ acre will require a PCN. Although a number of projects between 3 and 10 acres will now need individual permits, we believe that the increase in workload will be manageable. Moreover, a key element of the Corps' ability to manage the increased workload is the requirement of a Corps-only PCN for fills between ⅓ and 1 acre. While we do not believe that the notification of other agencies is necessary for activities in the ⅓ to 1 acre range, we will provide quarterly NWP 26 data to the Federal resource agencies for their programmatic review. The Corps will also coordinate its evaluation of those proposed activities that involve issues relevant to other Federal agency expertise (e.g., endangered species, water quality standards). In addition, the Federal resource agencies will be provided a copy of the PCN for fills over 1 acre and given an opportunity to comment to the Corps before the work is verified as authorized under NWP 26.

The Corps will continue to work closely with Federal and state resource agencies to add necessary regional conditions and procedures to the revised NWP 26. As with all nationwide permits, we will emphasize the requirement to avoid and minimize impacts on-site.

In summary, the revisions proposed today for NWP 26, and its planned replacement with activity-specific general permits, recognize fully the requirement to ensure that adverse effects to the waters of the United States are no more than minimal and the need to provide an expedited review process for truly minor activities. In taking the phased approach, we allow for an orderly transition from the previous NWP 26 to a set of activity-specific replacement nationwide permits. It is our intent to make this change in a manner that minimizes disruption and confusion for the regulated public, while at the same time improving environmental protection.

To further ensure that geographical areas or waters do not receive greater than minimal adverse effects through the excessive use of NWP 26, we are with this notice directing district and Division Engineers to carefully review areas under their authority with a view toward additional regional limitations to NWP 26. We believe that every district has high value aquatic areas where NWP 26 must be further limited or revoked.

Further, Division Engineers may revoke the NWP for specific geographical areas. District engineers

also have the authority to exercise discretionary authority and require an IP on a case-by-case basis when they determine that the ''minimal adverse effects levels'' will be exceeded. Furthermore, we are directing district and Division Engineers to further reduce impacts by requiring mitigation for most projects from ⅓ to 3 acres through the PCN process. In most cases, mitigation for impacts below 1 acre will be most beneficial through mitigation banks and ''in lieu fee'' programs. In lieu fee programs allow permittees to obtain mitigation through funds paid to groups who will use these funds to restore, create, enhance, and preserve wetlands. Such groups include states, counties and land trusts. Such in lieu fee approach is currently in place and very successful in the state of Ohio. Our Huntington district, in conjunction with the state, established a fee structure for NWP 26 authorizations. The fees go to Ohio Department of Natural Resources and are used to acquire, restore and manage former wetlands.

Review Period: A large percentage of those who commented on the proposal to increase the 30 day pre-construction notification period, expressed opposition to the proposal. They commented that 30 days is adequate and that an increase in the review period would only result in reviewers delaying their review rather than conducting more extensive reviews; that more extensive reviews, if conducted, are unnecessary for projects of NWP 26 magnitude, and that the proposal would result in an unnecessary extension in the processing time of what is currently a good expedited process. Approximately 30% of the commenters felt that the increase should be implemented in order to provide for more thorough review. One commenter recommended the elimination of the ''de facto'' authorization provision, because there is no logic to allowing the elimination of wetlands as a result of administrative situations.

Having given full consideration to the comments received and discussed the topic at length with the resource agencies involved, we have concluded that it is necessary to extend the review period to 45 days while maintaining the ''de facto'' authorization provision. Increasing the review period by only 15 days will, we believe, allow adequate and efficient review of the increased number of NWP 26 applications expected due to the lowering of the PCN thresholds, and will not place an unfair burden on the regulated public. The de facto authorization provision is considered necessary to provide a reasonable control on the review period for these relatively minor actions and to provide as much regulatory certainty as possible to the regulated public.

Regionalization: Many Commenters supported the concept of regionalization of the NWPs by districts either because of the opportunity to provide additional protection to sensitive ecological areas, as well as more appropriately to provide protection for regionally differing environments.

Many commenters were opposed to the concept of regionalization of the NWPs by districts because of concern that districts would, unnecessarily, further limit the applicability of the NWPs when they have been found by the Corps to authorize less than minimal adverse effects nationwide.

The Corps believes there are benefits to be gained through regional conditioning of NWP 26, both for natural resource protection and for the regulated public. Guidance being provided to the districts and divisions will require that the districts provide opportunity for full public review and comment in the process for establishing regional conditions, and will require that they consider modifications of the acreage limits and limitations of use, based on types of aquatic resources and activities. They will also consider potential impacts to the regulated public, to district workloads, and the ability of the district to effectively implement the regulatory program. Further definition of the permit, through regional conditions, will provide the regulated public with increased certainty and predictability while at the same time further ensuring against use of the permit under circumstances that may cause greater than minimal adverse effects. The fact that districts and divisions do regionalize NWP 26 through regional conditions to protect certain aquatic systems is one of the reasons that the Corps has determined that only minimal adverse effects occur nationwide.

Notification: Several commenters felt that all actions permitted under NWP 26 should be reported to the Corps to provide the Corps with full knowledge of the extent and impacts of such actions. In general, these same commenters also suggested that the Corps keep more extensive records of this information and make it readily available to the general public.

One commenter expressed concern for the lack of data collected by the Corps with regard to the use of NWP 26 and the corresponding lack of analysis to support the determination that NWP 26 results in no more than minimal adverse effects. A few commenters expressed the belief that the Corps is not fulfilling an earlier commitment to monitor and evaluate the impacts of NWP 26.

The reduction of the PCN threshold from 1 to ⅓ acre will significantly increase the percentage of activities reported to the Corps and provide an adequate level of information for continued monitoring of authorizations under NWP 26. Notification will have essentially three threshold limits. We have established a reporting requirement for all impacts up to the minimum threshold of ⅓ acre. This report, which will include basic information such as the name of the permittee, location of the activity, description of the work, and the types and size of the impacted area, will be required within 30 days of the completion of the work. We are encouraging support of, and participation in, this important information gathering process so the Corps can better determine ways to protect wetlands in a fair, flexible and effective manner. Next, we will require a ''Corps-only'' notification for impacts between ⅓ and 1 acre. These PCNs will be reviewed by the Corps to assure compliance with permit conditions, and to determine what level and type of mitigation should be required. Finally, authorization under NWP 26 will require full resource agency coordination under the notification procedures for impacts between 1 and 3 acres. For all the PCNs, the Corps review will ensure that no more than minimal adverse effects will occur and that appropriate mitigation will be required.

The Corps collected data from its district offices on the use of all NWPs for Fiscal Year 1995, including NWP 26. The data shows that 13,837 activities were authorized by NWP 26, impacting approximately 5020 acres of wetlands, with an average of 0.36 acres of impact per NWP 26 authorization. The Corps received approximately 5809 acres of mitigation for these impacts, yielding a mitigation ratio of approximately 1.15:1. To ensure continued monitoring of NWP 26 and all other NWPs, the Headquarters office will begin collecting quarterly data from the field beginning in the second quarter of fiscal year 1997. The data parameters will include, at a minimum, the use of the NWPs, both actual and estimated (for those with non-reporting thresholds), impact acreage, resource types, geographic locations (e.g., counties) and mitigation received. These parameters will be further set forth in guidance to the districts following the publication of this **Federal Register** notice and after coordination with the other Federal resource agencies.

Mitigation: Several commenters suggested that a threshold be set for requiring mitigation. Some recommended a threshold of one acre be set, above which mitigation would be required and one recommended mitigation be provided at a 2:1 ratio. A review of NWP 26 verifications provided in fiscal year 1995 indicates that more than an acre of mitigation was provided for every acre filled. We believe that this fulfills the national goal of no net loss in wetlands. We do not believe it is appropriate to require mitigation in every case or at a standardized ratio nationwide. We believe mitigation determinations are better established on a local and/or case-by-case basis. Therefore, we have not required a specific ratio as a general condition of NWP 26. However, we do believe that most actions involving fill of 1/3 acres or more will have some level of mitigation, based on the Corps determination of aquatic functions and values lost. Corps districts may establish fixed ratios for particular waterbodies or specific types of waters in their areas. Districts may also set specific in lieu fee schedules within their areas.

Many commenters raised concerns that, by applying compensatory mitigation in the context of a NWP, the Corps authorizes activities that, but for the mitigation, may have more than minimal adverse environmental effects. Those commenters were concerned that the CWA requires that only activities with minimal effects may be authorized by a general permit. Activities that have more than minimal adverse effects are subject to the individual permit process and the associated analysis of alternatives, individual public notice procedures, and other aspects of individual review that help to ensure that potential adverse effects are fully avoided and minimized before any activity is approved.

Given these concerns, the Corps will be considering whether or not modifications to the mitigation provisions of the regulations are appropriate and will be meeting with other Federal agencies to discuss this issue. In the interim, the Corps is seeking specific comment on the use of compensatory mitigation in the context of the Nationwide Permit program and any recommendations for modification to the mitigation provisions. Should the Corps determine that revision to this policy is appropriate, a rulemaking process to change the regulations at 33 CFR part 330 may be necessary. This process would include notice and full opportunity for public participation.

Subdivisions: One commenter recommended deleting all wording on subdivisions except that which clarifies the single-use applicability of NWP 26. More specifically the commenter recommends deletion of the exemption provisions of the NWP 26 subdivision rules.

One commenter suggested that ''commercial,'' ''industrial,'' and ''office'' subdivisions should not be held to the same restrictions as residential development because of their more extensive level of planning and design.

One commenter suggested that the October 5, 1984, date for subdivision exception be changed to January 21, 1992.

We have evaluated these comments and continue to believe that the subdivision language in NWP 26 is appropriate. We do not agree that, as a general matter, commercial office or industrial projects are necessarily subject to better planning than many large residential developments.

Environmental Impact Statement: A number of commenters recommended that an Environmental Impact Statement (EIS) or study be conducted prior to the re-issuance of NWP 26, because of their perception that the use of the NWP is causing or will cause extensive impacts to wetlands.

The Corps collected data from its district offices on the use of all NWPs for Fiscal Year 1995, including NWP 26. These data show that 13,837 activities were authorized by NWP 26 impacting approximately 5,020 acres of wetlands, with an average of 0.36 acres of impact per NWP 26 authorization. The Corps received approximately 5,809 acres of mitigation for these impacts, yielding a mitigation ratio of approximately 1.15:1. To ensure continued monitoring of NWP 26 and all other NWPs, the Headquarters office will begin collecting quarterly data from the field beginning in the second quarter of Fiscal Year (FY) 1997. The data parameters will include, at a minimum, the use of the NWPs, both actual and estimated (for those with non-reporting thresholds), impact acreage, resource types, geographic locations (e.g., counties) and mitigation received. These parameters will be further set forth in guidance to the districts following the publication of this **Federal Register** notice and after coordination with the other Federal resource agencies.

Furthermore, the Corps has conducted an analysis of the environmental impacts associated with the re-authorization of this permit in compliance with the requirements of NEPA. This analysis has been documented in an Environmental Assessment in accordance with NEPA and resulted in a Finding of No Significant Impact in accordance with NEPA. Therefore, an EIS is not required. The Corps believes that the modified NWP 26 structure, along with regional conditions and case specific discretionary authority, will ensure that adverse effects are no more than minimal on a watershed basis. We believe that it is inappropriate to simply sum the total acres of impact nationwide and assume significant impacts. We believe that environmental effects must be viewed on a watershed basis. With the substantial level of mitigation required by the Corps for impacts to the higher value wetlands, we believe that the environmental effects are not significant.

Corps Workload: The Corps agrees with the majority of commenters that a general permit, such as NWP 26, is necessary for fair, effective, and efficient implementation of the Corps regulatory program. Although the final NWP 26 we are issuing today will increase the Corps workload, we believe that overall workload will remain manageable.

To evaluate the effects of the current changes to NWP 26 on Corps workload, we analyzed data collected during surveys of the Corps districts during FY94 and FY95. Additionally, data from quarterly reports was used to determine IP workload. We estimate that the changes we are implementing today will increase the number of PCNs for NWP 26 (due to the lowering of the PCN threshold) by nearly 10,000, compared to the estimated 2,700 evaluated in 1996. However, the vast majority of the additional 10,000 additional PCNs will be Corps-only evaluations. We estimate that the NWP 26 we are issuing will result in approximately 500 additional individual permits nationally (approximately a 10% increase over Fiscal Year 1996). This increase will be due to applicants requesting IP authorization of projects with impacts greater than 3 acres, but which would have qualified for verification under the old NWP 26 guidelines. The Corps would not be in a position to evaluate all, or even a majority, of the activities we currently authorize under NWP 26 without severe impacts to the Corps responsiveness to the regulated public. The Corps regulatory program verified approximately 14,000 NWP 26 actions (including both those projects for which a PCN was required and those for which no PCN was required but verification was requested) and evaluated 5,040 IP actions in FY96. The workload associated with the additional processing of just the 14,000 currently verified NWP 26 cases as IPs, would increase the IP work load by a factor of 4 to approximately 29,000. An IP

workload increase of this magnitude would render the program ineffective, and would be a disservice to the American public and overall environmental protection. Additionally, it is estimated by Corps districts that another 20,000 NWP 26 activities were accomplished during FY96 without the requirement for reporting to the Corps. Complete elimination of NWP 26 would result in an increase in the IP workload by approximately seven fold. This level of increase would greatly extend the processing time for IPs, make Corps resources unavailable for jurisdictional determinations and enforcement actions, and severely reduce our ability to continue to protect the aquatic environment.

Others: The Corps intends to initiate substantial improvements to its data collection for all NWPs, particularly NWP 26. Furthermore, during the two year period that NWP 26 is currently issued, the Corps will collect data on the types of activities as well as impacts to the aquatic environment and mitigation required. We are also instituting a self reporting requirement for fills below 1/3 acre. The Corps will continue to collect data on acres of impact and mitigation on a permanent basis.

A few commenters recommended including a linear footage limitation on headwater systems of 200–500 feet (consistent with other NWP limitations) for application to linear wetlands and headwater streams.

We concur with this comment and have placed such a limitation on NWP 26 for activities directly affecting (filling or excavating) more than 500 linear feet of the stream bed of creeks and streams. Therefore, no activity that adversely effects greater than 500 linear feet of the stream bed can be authorized under NWP 26. The threshold of 500 linear feet was chosen to maintain consistency within the NWP program (500 linear feet is the PCN threshold for NWPs 12 and 13). We believe this additional limitation will enhance the program's ability to ensure that projects with potentially greater than minimal impacts will not be authorized under the NWP.

One commenter suggested that if wetlands are the driving force in lowering acreage limits, then lower acreage limits should only be set for impacts to wetlands and that it may be appropriate to raise the acreage limitations for projects that affect only ephemeral drainage areas. A few other commenters similarly recommended that the term ''headwaters'' include all naturally ephemeral streams regardless of their mean annual flow, in that they only exceed the average annual flow criteria because of high peak flows during the winter months, which artificially skew the average flow rates.

We believe the existing definition for headwaters, as currently written in 33 CFR 330.2(b), adequately provides for the consideration of ephemeral tributary systems and accommodates this comment. In addition, headwaters whether vegetated or not provide important flood storage and water quality values to the overall aquatic system. If some ephemeral drainage areas are truly low value the districts can develop and issue regional general permits to expand coverage.

Several commenters expressed the concern that NWP 26 reduces the program's protection of vernal pools and requested that the filling of vernal pools not be allowed under NWP 26.

We believe the provisions for ''discretionary authority'' at both the division and district levels is adequate to accommodate the concerns for unique waters.

One commenter stated that the NWP does not meet the regulatory requirements of the Natural Resources Conservation Service's Wetland Conservation Provisions (Swampbuster program) and continues the application of inconsistent standards on the communities regulated by the section 404 and Swampbuster programs.

The Corps finds no conflicts between this NWP and programs administered by the Natural Resource Conservation Service and is working closely with the NRCS to provide consistency in our programs. Since the standards for the two programs are different, as are the program goals, some differences will exist. We are committed to minimizing the differences to the extent possible.

One commenter stated that Corps districts differ in the methodologies used to calculate or determine where the ''5 cubic feet per second'' point is on waterways and that the methodology should be standardized. The commenter also recommended that there be a designated record keeping method and that the information be distributed or made available to the public.

We believe that the definition of headwaters is adequate to establish consistency in determination methodologies. The determination is normally an analytical one; however, abbreviated or simplified estimating methods are considered appropriate on a regional basis. We do intend to establish standard reporting methods for data collection.

One commenter felt that there is a need to clarify the definition of ''single and complete project'' for this NWP, suggesting that the permit should be applied differently (perhaps different thresholds) for projects that differ in purpose and size.

The Corps has provided guidance to the field regarding the definition of ''single and complete project'' and believes it would be inappropriate and inconsistent to modify that guidance for this permit. NWP 26 is designed to address minor filling activities with less than minimal impacts. Neither the magnitude of the project, nor the level or public interest, nor the nature of the applicant, are relevant considerations to the decision on whether the project's adverse effects are minimal. Our definition of ''single and complete'' project does not allow piecemealing projects regardless of the type of project.

One commenter requested a definition of special aquatic sites.

The definition of ''special aquatic sites'' is provided in the section 404(b)(1) Guidelines (40 CFR 230.3(q–1)). No further definition is considered necessary for the purposes of this nationwide permit.

A few commenters recommended that the Corps coordinate all applications with natural resources agencies, including applications for activities under one acre in size.

The Corps believes that activities involving less than 1 acre of waters of the United States are generally minor in nature, and that multiple Federal agency review is not necessary. The Corps staff is well trained in the biological and environmental sciences and is fully qualified to assess potential impacts. The Corps experience with agency response to the existing PCN for 1–10 acres indicates that the natural resource agencies, which also have limited human resources, provide very few site specific substantive responses at the lower end of the 1–10 acre range. Thus, we would expect even fewer comments for projects with impacts below 1 acre. Also, the additional administrative workload associated with agency coordination would seriously impact the Corps ability to focus on projects with greater impact.

A few commenters recommended the Corps strictly enforce the requirement for all NWP 26 applicants to submit a wetland delineation with the pre-discharge notification.

The Corps strives to implement the program in as reasonable and flexible a manner as possible so as not to impose unnecessary burdens on members of the regulated public. We do require wetland delineations to the extent necessary to identify the resources being affected and the necessity for adequate mitigation when appropriate. The level of

refinement of such wetland delineations is left to the discretion of the districts on a case-by-case basis. NWP 26 is reissued with modifications as discussed above.

27. Wetland and Riparian Restoration and Creation Activities: The Corps proposed to modify this NWP to allow projects to occur on any Federal lands. We also requested comments on whether to allow creation of wetlands and their subsequent reversion on reclaimed surface coal mined lands, to eliminate the 5 year window of reversion opportunity and allow the reversion to occur at any time in the future, to allow use of NWP 27 for any voluntary restoration/creation project, to include enhancement as an option, and to require a written agreement in all cases.

There were several commenters for and an equal number of commenters against the proposed modification of the permit to allow projects to occur on all Federal lands. One commenter felt that the proposed permit would grant more flexibility on Federal lands. Another commenter felt that the Corps should not require review and approval of an Operation and Maintenance Plan for projects on Federal lands or carried out by Federal agencies since the Corps does not review or approve such plans for projects on private lands. We believe that all Federal agencies should be encouraged to participate in wetland restoration and creation projects and have modified the permit for all Federal lands. Because the permit is limited to restoration, enhancement and creation activities and because authorizations for those projects occurring on Federal land will not provide the opportunity for reversion of the wetlands without a permit from the Corps, we concur that an Operations and Maintenance Plan approval is unnecessary and we have not included this requirement in the final permit.

Several commenters supported the consideration of expanding the permit to allow for the creation of wetlands and their subsequent reversion on reclaimed surface coal mined lands, provided the wetlands were voluntarily created under an OSM permit or an applicable state program permit. A few were opposed to this idea. Some stated that wetlands created due to hydrologic or topographic features of the landscape that may occur during reclamation should not be excluded. One commenter stated that the existence of a Surface Mining Control and Reclaimation Act (SMCRA) permit document and a certification that reclamation has been performed in accordance with permit requirements, should be sufficient to document the fact that the wetland construction was voluntary and non-mitigative. The Corps believes the potential for gaining several thousand acres of additional created wetlands through this provision warrants modification of the permit as outlined in the proposal. The permit wording has been changed to include wetlands voluntarily created under an OSM permit or applicable state program permit, with limitations not allowing its use for wetlands created as mitigation, nor to wetlands or waters that would be created naturally due to hydrologic or topographic features, nor to wetlands created for a mitigation bank. Reversion of such voluntary wetlands in the future is authorized by this NWP subject to the terms and conditions of this NWP.

A few comments were received regarding the consideration for eliminating the 5 year window of reversion opportunity and allowing the reversion to occur at any time in the future. Some commenters felt that the 5 year window of reversion opportunity should be retained, while others felt it should be removed. Some commented that removal of the 5 year limitation on the window would attract more conversion of abandoned coal mining sites to wetlands. The 5 year window for reversion of wetlands was adopted for written agreements that had limited terms, for wetland restoration and creation, between landowners and the Natural Resources Conservation Service (NRCS) and the U.S. Fish and Wildlife Service (FWS). For example, upon the expiration of such a 20 year agreement that landowner could revert the wetland back to the prior condition of that land. In most cases, the reversion would involve activities that require a permit from the Corps. We believe that in order to authorize these reversion activities by the NWP for an agreement that had expired, there needed to be a time limit after the agreement expired, to complete any reversion, or an IP would be necessary. The 1996 Farm Bill (Pub. L. 104–127) has included provisions for NRCS to document voluntary wetland restoration, enhancement, and creation activities that can be reverted to the prior condition at any time. In order to support and encourage such voluntary restoration, enhancement, and creation activities, we are authorizing those activities and the reversion of such wetlands to their prior condition by this NWP. While in these cases there will not be a 5 year reversion limit, since the agreement/documentation does not have a time limit, we are requiring a notice to the Corps with adequate documentation by NRCS of the prior condition.

Some commenters felt that the permit should be expanded to include any voluntary restoration or creation projects, to include private parties on private lands without signed agreements with either the NRCS or the FWS. A large number of commenters expressed opposition and an equally large number of commenters expressed support for allowing the permit to authorize projects on non-Federal public lands. Some commenters stated that activities on state fish and wildlife management areas, conducted by a state agency, should be included in this permit. One commenter felt that the Corps should grant state agencies a statewide exemption for managing wildlife populations. Some stated that they would support expanding use of this permit to voluntary restoration and creation activities by state and local government agencies provided those agencies demonstrate a long-term commitment to maintenance of the created or restored area. The Corps believes that including authorization for all creation, enhancement, and restoration activities on any lands (Federal, non-Federal public lands and private lands) would provide a less burdensome permit process and provide additional incentives for wetland creation, enhancement, and restoration projects. The nationwide permit has been modified to include authorization for public and private entities to conduct creation, enhancement, and restoration activities on any lands, but with no opportunity for reversion of those wetlands without a permit from the Corps, provided the permittee notifies the District Engineer in accordance with the ''Notification'' general condition. This NWP cannot be used to authorize the reversion of such wetlands.

With regard to whether or not to include enhancement as an option, one commenter stated that while most enhancement projects have little adverse effect to wetland functions, measures considered by some parties to be enhancement may at times be considered by others to have unacceptable negative effects on wetland functions and values. Another commenter stated that the inclusion of enhancement without technical criteria for project review may increase the risk of existing areas of wetland being converted to other wetland types. The existing NWP provided for enhancement of wetlands, but this was not clearly stated, by providing for ''restoration of * * * degraded non-tidal wetlands.'' Further, we believe that

this NWP should authorize the enhancement of degraded wetlands. We agree, and do not intend, for this NWP to allow ''enhancement'' for the conversion of one wetland type to another. We have included enhancement projects but have limited enhancement under this NWP to improving degraded wetlands.

We concur with these comments and believe that to ensure no more than minimal impacts will result from the authorization, we cannot include enhancement within the scope of this NWP.

Several commenters felt that there was a need for a binding agreement in all cases, even where voluntary restoration is occurring under other Federal or state programs without a written agreement, while others felt that binding agreements were not necessary. One commenter stated that the written agreements do not have to be easements or contracts, which may dissuade many landowners from participating, that the agreements could be management agreements which become conditions to the permit. One commenter stated that for voluntary restoration and creation projects involving a Federal or state agency, an agreement should be required, and for a voluntary project that does not include Federal or state cost sharing or technical assistance, no agreement should be required provided hydrologic and vegetative baseline conditions are documented. We have concluded that the requirement for a binding agreement is not necessary in all cases. However, where the authorization provides opportunity for reversion of the created or restored wetland to its non-wetland state (i.e., in those cases involving private parties entering into contracts/agreements with, or documentation of prior condition by, the NRCS or FWS under special wetland programs or an OSM or applicable state program permit), then a binding agreement, documentation, or permit by NRCS, FWS, or OSM or applicable state agency, which clearly documents the prior condition, must be required. We have clarified in the NWP that reversion can only occur where such instruments, which clearly document the prior condition, are excepted. In all other cases, where the reversion opportunity is not included and a permit will be required for alteration of the restored, enhanced or created wetland or no binding agreement or documentation of the prior conditions will be required.

A few commenters stated that there was no need to document baseline conditions. Some commenters felt that in cases of purely voluntary efforts, there does not appear to be a compelling need for rigorous documentation of the baseline conditions. Others felt that this permit should include conditions that require documentation of existing use, hydrology and vegetation baseline conditions and allow reversion to previous use provided it does not exceed the previous conditions. Some felt that the format for documenting baseline conditions should be standardized, while others felt that the baseline condition could be documented in a predischarge notification, by way of a wetlands and waters of the United States delineation. Some commenters suggested that this permit should not authorize conversion to pre-restoration conditions where baseline conditions cannot be documented. The Corps believes it is only necessary to document prior (baseline) conditions for those cases where there would be an opportunity for reversion of the restored or created wetland to their original condition. Furthermore, for those cases where the opportunity to revert the wetland to a non-wetland status is available, documentation of the prior condition is required though NRCS, FWS or OSM programs. The Corps agrees that the prior condition must be documented in such cases. Consequently, prior conditions will be documented in those cases allowing reversion of wetland to non-wetlands. If that documentation cannot be provided at the time the reversion is requested, then an IP would be required for any reversion. In those cases where a permit from the Corps will be required for alteration of the created or restored wetland, we do not believe that the prior condition need be documented.

Some commenters stated that notification to all resource agencies should be included with this permit and further that the Corps should be required to notify all interested persons that could be affected by the restoration or creation activities. Others advocated limitations such as requiring notification with agency coordination for activities exceeding ⅓ acre. Some commenters were afraid that restoration of wetlands to create waterfowl feeding areas could, as an example, adversely impact other species, which could be identified through agency coordination. The Corps believes, based on the changes and modifications discussed above and the scope of the authorized activities, that the activities and impacts authorized by this NWP will not only be minor in nature, but will result in positive contributions to the national goal of increasing wetland areas. We believe notifications to the agencies and all affected parties would be unnecessarily burdensome to all the parties and would be excessively duplicative governmental review without commensurate environmental benefits.

One commenter suggested that the permit not authorize discharges into open water. The Corps has not limited the permit to not apply to open water. To do so would excessively limit the use of the nationwide permit. It is anticipated that most activities authorized under this permit will be in channels, ditches and some small impacted streams. It is unlikely that fills in larger open water areas such as lakes or rivers would occur, particularly with the requirement that impacts be less than minimal.

Another asked that this preamble clarify the relationship between this NWP and the proposed new NWPs A for Moist Soil Management and NWP B for Food Security Act Minimal Effect Exemptions. This NWP is for the restoration, enhancement, or creation of wetlands while NWP 30 Moist Soil Management (proposed NWP A) is for management of wetlands and proposed NWP B is for wetland mitigation created for the loss of wetlands on agricultural lands.

Another commenter suggested clarification of the term ''non-tidal'' in the context of this permit, suggesting that term should only apply to naturally non-tidal wetlands and not to formerly tidal wetlands which have been diked and are now freshwater wetlands. The term tidal is defined in the Corps regulations at 33 CFR 328.3. Non-tidal refers to the existing conditions and would include former tidal areas that no longer meet the definition of tidal waters.

One commenter also suggested that this NWP apply to compensatory wetland mitigation for Federal aid transportation projects, and another recommended that this permit not apply to projects that are primarily stormwater treatment projects. Compensatory wetland mitigation activities required under Corps permits (such as those for FHWA projects) are normally authorized by the permit requiring the compensatory mitigation and this NWP would generally not apply. This NWP authorizes the restoration, enhancement, and creation of wetlands and does not address their need. If wetlands are created for stormwater treatment projects they would be authorized, if they meet the terms and conditions of this NWP. However, generally reversion of such wetlands would normally not be authorized by

this NWP. NWP 27 is reissued with changes discussed above.

28. Modifications of Existing Marinas: The Corps proposed no changes to this NWP. One commenter stated that compliance with state permits or exemptions would be required where submerged state-owned lands were included in the modification of an existing facility. The intent is not to allow any additional slips or docks, thus additional water quality, navigational or safety impacts would not occur. We recognize the need for compliance with all existing applicable regulations. The issuance of this NWP would not obviate the need to obtain other Federal, state, or local authorizations required by law. NWP 28 is reissued without change.

29. Single-Family Housing NWP: The Corps proposed modifying the notification process for this nationwide permit to provide for resource agency coordination during the notification review process.

General: A large number of commenters opposed reissuance of NWP 29, expressing the opinion that the permit does not conform to the requirements for general permits, violates the Fish and Wildlife Coordination Act and is not in compliance with the National Environmental Policy Act. One commenter stated the belief that the permit is inconsistent with Florida statutes.

The Corps believes that NWP 29 is in compliance with all Federal laws and regulations. The permit is for actions that are similar in nature, both in size and type (less than ½ acre, single family residences). With the general, regional, and specific conditions, the district's opportunity to review each case through the notification process, and the district's opportunity to exercise discretionary authority, we are confident that individual and cumulative adverse effects will not exceed minimal. Initial development and issuance of the permit along with this reissuance has been done in full compliance with 33 CFR part 330, which includes compliance with the Fish and Wildlife Coordination Act and NEPA. If the permit is in some way not consistent with state law, the state can deny its section 401 water quality certification. Furthermore, issuance of any Corps permit does not allow applicants to violate state, local or other Federal laws.

One commenter opposed the NWP because the program usually prohibited houses in wetlands before this NWP. Another commenter expressed opposition based on the belief that the issuance of the permit will increase property values and cause taxes to increase.

The Corps regulatory program has never prohibited fills for the construction of homes. IPs were required, however, which in some cases may have resulted in denials due to the availability of practicable alternatives available to the applicant. However, most projects were permitted following the review and analysis associated with the IP process for single family residences. Moreover, virtually every IP that was issued involved only on-site avoidance, minimization, and, in a few cases, compensatory mitigation, because offsite alternatives for this type of project are not generally viewed as practicable. The IP process continues to be required for proposals which exceed the ½ acre or the minimal effects limitations of the permit or where the Corps district uses its discretionary authority. The effects of the permit on property values relative to state and local taxation programs are unknown to the Corps and is not an issue for consideration by the Corps regulatory program.

A couple of commenters expressed the opinion that the NWP was created only for political reasons in that there was no natural resource protection basis for its creation. The permit was initially issued and is being reissued to provide regulatory relief to small landowners for projects with minimal adverse effects on the aquatic environment. While an important goal of the Corps regulatory program is to protect the Nation's aquatic resources, providing timely and efficient decision-making and rendering fair and reasonable decisions for the applicant are also established goals of the program. We believe this permit is consistent with the goals of the regulatory program, including protection of the aquatic environment. Virtually every single family residence application for fill was, in the past, authorized as long as impacts on-site were minimized. The Corps assures this same level of protection of the aquatic environment through the NWP 29 PCN process.

Many commenters supported reissuance of NWP 29, but these commenters were split with regard to whether the notification of the actions should be provided to resource agencies prior to authorization. One commenter recommended that we carefully avoid unnecessary regulatory oversight with notification. The Corps has concluded that the notification procedures for this permit should include agency coordination. The permit has been reworded to effect this change.

Some commenters recommended that the permit be temporary because it attempts to assist small landowners who had unknowingly purchased wetlands or purchased the land prior to wetlands regulation. The commenters recommended we not reissue the permit after the year 2001, at which time the regulatory program will have been in place for almost 30 years. The Corps is reissuing for a period of 5 years and all NWPs will be reviewed for reissuance prior to their expiration in the year 2001.

Permit Limitations & Definitions: Several commenters suggested the modifying the limits of the permit and recommended the following: Limit fills to ¼ and ⅒ of an acre; exclude use in open water areas; require mitigation for fills over 50 cubic yards; and, disallow use for fills in mitigation sites. One commenter recommended the permit be limited to a specific number of ½ acre authorizations allowed per wetland. Another suggested establishing limits based on ecosystem rather than ownership. Two commenters recommended that we prohibit discharges within 100 feet of streams supporting anadromous fish. One commenter recommended excluding certain regional waters. One commenter stated that it was a major oversight to allow this NWP to apply to non-tidal wetlands adjacent to the ocean. One commenter commented that the permit should be limited to authorization of primary residences only and another recommended that mitigation be required as a condition of the permit.

After careful consideration of all the comments, and based on our experience with NWP 29 over the past year, the Corps has determined that the acreage limitation should be retained at ½ acre, a limit should be imposed to require a ''no fill'' buffer between the fill and any free flowing stream, river, or other flowing waterbody and/or the normal spring high tide in tidal areas. Data collected on the use of NWP 29 over the last year has shown that the average impact per NWP 29 across the nation was approximately 0.19 acres. The data also shows that during none of the quarters did the average impact acreage go above 0.25 acres. Additionally, it should be noted that the average acreage requested was only 0.31. For all of Fiscal year 1996, the Corps authorized 333 projects for a total of 62 acres of fill nationwide. The total acreage of fill requested by applicants was 101 acres, thus the Corps review reduced the requested impacts by 40%. Furthermore, mitigation may be required for higher value wetlands. Of course, as with all NWPs, the Corps

districts will ensure that the fill is the minimum needed on a case-by-case basis. If additional levels of protection are necessary, Corps District and Division Engineers will add regional conditions as they did in several districts in 1995. As with other NWPs, such regional conditions could revoke NWP 29 in certain high value aquatic areas or add region specific limitations on the use of NWP 29.

One commenter requested a clearer definition of ''non-tidal'' to ensure adequate protection of marine and estuarine habitats. The commenter pointed out that the definition differs between the Rivers and Harbors Act (mean high water) and the Clean Water Act (Spring high tides or other high tides with periodic frequency), and recommended the adoption of the CWA definition.

The definition of tidal waters can be found in 33 CFR 328.3(f) and is defined as those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun (the high tide line). Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects. The high tide line includes the normal spring high tides. The limits of Corps jurisdiction in non-tidal waters of the United States can be found in 33 CFR 328.4(c). This regulation does not mean that wetlands adjacent to tidal wetlands are also tidal wetlands, but rather that in coastal areas, Corps jurisdiction extends to the limits of these ''non-tidal wetlands'' that are adjacent to tidal wetlands. Consequently, this NWP is applicable to wetlands that are adjacent to wetlands subject to spring high tides. However, divisions can, as some did in 1995, provide regional conditions to exclude high value wetlands adjacent to tidal waters.

Several commenters requested either elimination or a more detailed definition of the term ''attendant features''. They suggested that swimming pools, tennis courts, barns, small businesses and septic fields should not be allowed. The purpose of this permit is to reduce the regulatory burden associated with the construction of single-family homes while maintaining environmental protection. When building single-family homes we recognize that, besides the foundation of the house itself, there are activities associated with a house that are considered necessary, customary, or normal to home sites. We believe these ''attendant features'' should normally be authorized with the house. We would not accomplish the purpose of this permit if we were to authorize the house only and process an IP for the attendant features. Attendant features, for the purpose of this permit, include features that are reasonable, necessary appurtenances constructed in conjunction with single-family housing activities. Examples include a garage, driveway, storage shed, septic field, and yard. Examples of inappropriate attendant features not covered by this permit include a barn, which may be covered by NWP 40, or a small business. Such features would not be directly related to a single-family home. While we believe that a yard is an appropriate attendant feature of a single-family home, we have not identified a size that will work for all NWP 29s. Therefore, we will work with the applicant to ensure that acceptable, but not excessive, yards are authorized. This NWP only authorizes activities from the perspective of the Corps regulatory authorities, other Federal, state, and local permits, approval, or authorizations may also be required. The permittee would be responsible for obtaining all necessary authorizations, including building permits, prior to placing a septic system, yard, or any other fills in wetlands. Additionally, water quality is a concern addressed by applicable state agencies as well as the Corps. It is the permittee's responsibility to obtain any necessary water quality approvals or authorizations prior to the discharge of fill. Furthermore, while properly designed, constructed, and operated septic systems can be placed on fill in many wetlands, the septic system must be approved by the appropriate state or local agency. The Corps has determined the extent of the attendant features to be applied on a nationwide basis. If an individual district concludes that a particular feature should not be authorized under this permit, then the Division Engineer must regionally condition the permit to exclude the feature. Furthermore, additional restrictions may be placed by states in 401 water quality certification or CZM consistency determination. On a case-by-case basis, where a particular feature is not appropriate at a specific site, the District Engineer may condition the NWP or require an individual permit.

As a Corps district evaluates each request under NWP 29, they will consider the proposed home and attendant features in the context of the functions and values of the waters of the United States as well as local zoning and regulatory set-backs and requirements. If uplands are available on the applicant's property to reasonably accommodate the home and attendant features, after considering property line set-backs and other requirements, the Corps will not authorize the project under NWP 29 and instruct the applicant to apply for an IP. If fill for the home and for attendant features is needed, the Corps will determine the amount of fill based on the aquatic functions and values to be impacted. Specifically, attendant features such as a yard, tennis court, or swimming pool may be limited, or not authorized, if the project is located in high value wetlands. The Corps will generally require septic systems to be located as far as possible from open waters, and will otherwise attempt to ensure that septic systems will not adversely affect the quality of surface waters.

Effects & Cumulative Effects: One commenter expressed concerns for adverse effects on floodplains resulting from issuance of the permit. Two commenters expressed concern for water quality impacts due to the typical location of NWP 29 activities within watersheds. Several commenters expressed the belief that this permit encourages housing development in wetlands, and several expressed general concerns for the cumulative impacts.

Because the activities associated with the use of this permit could be located within the floodplain or a waterbody, there is potential for increased flooding and reduced flow. The notification process allows the district to evaluate the proposed impacts, including potential flooding impacts, compare them to existing impacts within the wetland system or watershed, and determine if the project has more than minimal individual or cumulative adverse effects. The district will use its discretionary authority to place conditions on a proposed activity to avoid or minimize these potential impacts. If the activity is determined to have more than minimal adverse effects, the district will require mitigation or an individual permit. The district and division offices may identify specific geographic areas, such as a subdivision, or a particular aquatic system, where there may be concerns regarding cumulative impacts to a watershed. If such impacts are identified, the division will revoke this NWP in specific geographic areas or develop regional conditions that apply to that specific area. Many districts and divisions have already revoked NWPs, including NWP 29, or imposed such regional conditions in many geographic areas or wetland or water types.

Coordination: One commenter asked that we require Endangered Species Act and Historic Preservation Act coordination prior to authorization under this permit. One commenter requested that we require compliance with Federal, state, and local regulations. The Corps believes that the provisions of Nationwide Permit Conditions 11 and 12, which address endangered species and historic properties, as well as the procedures in 33 CFR part 330, are adequate for guarding against unacceptable impacts in these areas of concern. Moreover, by issuing a verification letter the Corps has made a determination of ''no affect'' on endangered species and ''no adverse affect'' on historic properties. The issuance of a Federal permit does not obviate the need for applicants to comply with all other Federal, state and local laws and regulations, and it is incumbent upon the applicant to comply with all applicable requirements.

Subdivisions: One commenter suggested applying the current ½ acre limitation for subdivisions created on or after November 22, 1991, to all subdivisions regardless of the date they were created. One commenter requested a more elaborate discussion on what constitutes a subdivision. Another recommended the subdivision date be 1977 when the scope of the Corps regulatory jurisdiction was expanded and 404(e) was first enacted, or 1984 when many property owners were made aware of the need to obtain permits. Another commenter suggested limiting the permit to those persons who purchased their properties prior to enactment of Section 404 of the Clean Water Act. One commenter asked what constitutes ''creation'' of a subdivision, is it the date the subdivision was first drawn on a piece of paper or the date it was approved by a planning jurisdiction? One commenter requested the addition of a subdivision rule (interpreted to mean a more detailed discussion of subdivisions within the permit).

November 22, 1991, is the date on which the current NWP program regulations, including issuance of, reissuance of and modifications to the previous NWPs were published in the **Federal Register**. It was in these regulations that the terms surrounding subdivisions for the purpose of NWP 26 were outlined and awareness of the subdivision clause was heightened. With few exceptions, we believe this date would be fair to all parties. We do not believe that the November 22, 1991, date penalizes any one group of individuals and that is the date which has been in use since issuance of the nationwide permit on September 25, 1995. The subdivision date refers to when a parcel was subdivided into smaller parcels, not when the subdivided smaller parcels are sold. Therefore, individual parcel owners are not penalized based on when they purchased property. The term ''creation'' refers to the date the tract of land, after being subdivided, is officially approved by the appropriate state or local governing agency. The conceptual subdivision of land is not acceptable.

One commenter recommended that the permit be conditioned to not allow for multiple ownerships by family members to circumvent the subdivision clause. We believe that the conditions limiting the use of this permit to single-family residences, personal residence, once per parcel, and not more than ½ acre total per subdivision created after November 22, 1991, are adequate conditions to limit use of the permit and ensure compliance with the ''minimal effects'' criteria for general permits. Multiple ownership by the same family within a subdivision created after November 22, 1991, would not allow for any greater fill than single ownership of the subdivision, in that the total aggregate fill could not exceed ½ acre. NWP 29 is reissued with the modifications discussed above.

30. Moist Soil Management for Wildlife: This NWP was proposed by the Corps as a new nationwide permit (proposed new nationwide permit A) to authorize activities necessary to manage, construct, and/or maintain habitat and feeding areas for wildlife on Federally-owned or managed and state-owned or managed property.

Many commenters supported the NWP as proposed. Several of the commenters felt that the NWP should include activities on privately-owned lands managed by Federal agencies. These are agencies with expertise in the subject area and are responsible for managing the lands in concert with the objectives of the Federal wetlands programs such as NRCS and FWS or state plans. A few commenters stated that wetland areas under permanent easement and deed restrictions should be covered by the NWP. One commenter stated that privately-owned lands should not be included. This permit was proposed by the Corps specifically for application to Federal and state resource agency activities. It is intended that the permit apply to managed lands as well as lands owned by these Federal and state agencies. The techniques listed in the permit are not ''all inclusive,'' but meant to be representative of the types of activities included. The list has not been expanded for the sake of brevity.

A few commenters asserted that discing or plowing are activities that are not, and should not be, subject to regulation. Mowing and bush hogging are two examples of vegetation removal, which if done so as not to substantially disturb the root system, are not regulated under section 404. (See 33 CFR 323.2(d)(2)(I)). While discing and plowing activities are exempt from regulation pursuant to CWA section 404(f)(1) when conducted in conjunction with ongoing farming activities, such activities are not exempt for the purposes of wildlife management. Thus, this permit specifically authorizes these activities.

A few commenters were concerned about implementing adequate review measures and suggested that the Corps include a Federal and state wildlife agency PCN to ensure that any conversion of wetland types would be minimal or an IP would be required. Because these agencies have extensive expertise in wetland management and are responsible for managing the lands in concert with the objectives of Federal and state wetlands programs, we believe the PCN processes would result in unnecessary and duplicative governmental review. Furthermore, we have added an additional restriction to the NWP to not authorize converting wetlands to open waterbodies. Proposed Nationwide Permit A is issued as proposed and discussed above as NWP 30.

31. Maintenance of Existing Flood Control Projects. General: This NWP was proposed by the Corps as a new nationwide permit (proposed new nationwide permit D) to authorize the excavation and removal of accumulated sediment and associated vegetation for maintenance of existing flood control facilities. The majority of those commenting on this proposed NWP were in support of its issuance. Most viewed this permit as one that would greatly improve the local sponsor's ability to perform critical flood control maintenance activities. Several commenters felt that, especially for some projects, using this NWP would violate 404(e) because maintenance work would have more than minimal adverse effects on fish and wildlife resources. Their concern was for use of the permit for older flood control projects now supporting fish and wildlife habitat. Many of these commenters felt that maintenance dredging in some areas could result in perpetuating past mistakes and, for older projects, it may be impossible to determine the original dimensions.

Many commenters felt that flood control channels that develop and support wildlife need public review and agency comment and a PCN requirement will not substitute for public review as required by the Clean Water Act.

We believe that with the limitations and conditions included within the final permit, the NWP will comply with the ''minimal effects'' criteria for general permits. Safeguards for the protection of valuable habitat have been included within the permit, particularly in the procedure for the District Engineer (DE) to determine the maintenance baseline and the provisions allowing for the DE to require mitigation.

Recommendation for Expanding the Permit's Scope: Numerous comments recommended expanding the scope of this NWP. Some of the recommended inclusions were state and city flood control maintenance activities; maintenance of stormwater management facilities; water conservation facilities; retention/detention basins and channels constructed by municipalities, watershed management organizations, and watershed districts (in compliance with surface water management practices required by the state); any Federal, state, or locally funded flood control project; irrigation facilities; any facility where an NEPA document has been prepared; drainage system inlets and outlets; manmade channels or structural projects developed under authorization of Federal or state governments; and any facility that was constructed through excavation prior to the Excavation Rule. One commenter stated that any ''improved channel'' or detention facility constructed before July 1975 or after July 1975 if it met exemption from 404 regulations or fell under 404 regulations and was authorized by the Corps should qualify for this NWP.

Many of the facilities included in the above recommendations would be included in the final wording, which authorizes maintenance of existing flood control facilities previously authorized by the Corps regulatory program or constructed by the Corps and transferred to a local sponsor for operation and maintenance. However, this NWP was proposed for maintenance of ''flood control'' facilities. In order to expand the scope of this NWP to include other types of facilities such as irrigation and drainage projects, we would need to propose such a change for public comment and opportunities for a public hearing. Therefore, we are not expanding the scope of this NWP to include other types of facilities. However, we will seek public comment regarding other types of activities that should be authorized by NWP and, if appropriate, we would propose an NWP for such facilities.

Two commenters suggested that this NWP include construction of cofferdams and access roads necessary to conduct maintenance of the flood control facilities rather than require separate notification under NWP 33. We believe this permit should be limited to maintenance activities of existing flood control facilities and that temporary construction activities would more appropriately be authorized by IPs or NWP 33, which has a specific notification requirement for a restoration plan.

Recommendation for Limiting the Permit's Scope: A few commenters recommended restricting this NWP to only on-going flood control projects. One of these commenters specifically suggested that the NWP should be worded to state that for a project to qualify for this NWP, it must have been maintained within the past 3 years unless otherwise stated in the original permit. One commenter suggested using the safeguards contained in NWP 3—that this NWP applies only to the repair, rehabilitation, or replacement of currently serviceable water management projects authorized under Federal, state, or local governments, provided the environmental effects resulting from such repair, rehabilitation, or replacement are minimal. One commenter suggested a 5 acre threshold for this NWP, and another felt that any threshold would be arbitrary and instead recommended that this determination be made based on the quality of the existing aquatic resource and how the site will be impacted by the proposed excavation activity.

We included provisions within the NWP to limit maintenance activities to an established maintenance baseline, to be determined by the DE. The process prescribed for determining the baseline includes consideration of the facility's maintenance history, and other factors designed to identify the purpose and need for the proposed maintenance, and that the proposed maintenance activity is not excessive to achieve that need. We believe that specific threshold limits would be inappropriate and unnecessarily restrict projects that should qualify for this NWP.

Pre-Construction Notification: Many commenters were opposed to having any preconstruction notification requirements. They felt that it would be duplicating the efforts of other entities for the Corps to review flood control projects that adhere to the original schedule for maintaining the facility. One commenter added that requiring a PCN would be contrary to the Corps goals to avoid unnecessary regulatory controls and reduce unnecessary paperwork and delays for permittees. Several commenters were concerned that additional coordination could pose a threat to public health and safety if flood control districts were impeded in any way to maintaining a facility. Two commenters specifically requested that there be no PCN requirement for the facilities designed and constructed to comply with local or state water quantity and/or quality control requirements when the depth and area of dredging is in accordance with the originally approved design plans. Another commenter suggested that no PCN be required for emergency maintenance performed as a result of a local, state or Federally declared disaster.

Numerous commenters provided recommendations for thresholds of when to require a PCN, ranging from 100 to 100,000 cubic yards or at a 1 acre threshold. One commenter suggested that a 25 cubic yards limit be used in streams supporting anadromous fish. Another threshold to require a PCN was whenever previous maintenance activities occurred more than 5 years earlier. One commenter suggested using 50 cubic yards as the PCN threshold stating that under 50 cubic yards the applicant could use NWP 18/19. Another commenter suggested 10 acres or 1 acre/mile of channel/year. Another commenter recommended that the impacted area threshold be 10 acres minimum for each unlined basin and 25 acres minimum for each soft bottom channel reach before a PCN was required. One commenter interpreted the preamble to imply that only unlined basins and channels would require a PCN and that the regulation itself should reiterate that requirement.

Following the DE's determination of the maintenance baseline, which requires a notice to the Corps, a PCN is required for maintenance activities. We believe that there is a need for notification for maintenance activities to ensure compliance with the permit conditions and to monitor maintenance of the flood control facility. The PCN is required prior to each maintenance activity or a maintenance plan can be submitted just not to exceed 5 years. The Corps prefers the submittal of a 5 year maintenance plan. This is a new NWP. The Corps will monitor this NWP. If appropriate, the Corps would consider proposing to reduce or eliminate the PCN requirement. Furthermore, if the project is effectively abandoned due to lack of proper maintenance, a new

determination of a maintenance baseline would be required before this NWP could be used for subsequent maintenance.

Recommendations for Permit Conditions: Several commenters recommended that this NWP be conditioned to preclude maintenance work that would result in wetland and/or riparian habitat impacts. One commenter suggested the following wording be added to both the preamble and the permit itself: ''In circumstances where the DE determines that the channel proposed for maintenance provides other significant social or ecological functions and values that may be jeopardized, the Corps will exercise its discretionary authority to require an individual permit.'' One commenter suggested that the following conditions be added to this NWP: (1) All excavation must have been previously addressed in the project's original EIS; (2) the excavation is still necessary to obtain the project's original goals; and (3) the benefit of attaining those project goals still justify the cost of the environmental impacts that result from the removal at this time (as opposed to the time when the original EIS was completed).

We believe the objectives of these recommendations are essentially achieved through the application of the final wording of the permit, the requirement to establish a maintenance baseline, the nationwide permit general and section 404 only conditions, and the opportunity for the DE to exercise discretionary authority and/or require mitigation for resource impacts.

One commenter requested that the Corps delete the requirement for an applicant to specify the disposal site. The reason for this is that, in many cases, the disposal site is not known until after the bids for the project are submitted, which may occur after the NWP has been verified. This commenter suggested that the requirement be replaced by a commitment from the applicant to dispose of material at an upland site. Other commenters recommended that the NWP be expanded to allow the disposal material in jurisdictional areas where the applicant can show a beneficial use for its disposal. Another commenter recommended that the location of the disposal site be identified only if it is within the Corps jurisdiction. One commenter suggested that the NWP specifically state that this NWP does not authorize side casting excavated material into waters of the United States, agitation dredging, or where dredged material testing is required.

The NWP does not require that the disposal site be specified in advance, however, it does require that dredged material to be placed in upland areas or currently authorized disposal areas in waters of the United States. Use of the disposal site must also be in compliance with all Federal, state and local requirements, as must every aspect of the project, or the NWP is not valid.

One commenter added that should such work be allowed, there should be a requirement to mitigate for unavoidable impacts to fish and wildlife resources. Another commenter was concerned that mitigation would be required for projects, especially for those constructed prior to the enactment of the Clean Water Act in 1972, causing an undue financial burden on applicants.

The final NWP includes provisions for the DE to determine the need for mitigation when determining the maintenance baseline. In determining the need for mitigation, the District Engineer will consider the following factors: any original mitigation required, the current environmental setting and any impacts of the maintenance project that were not mitigated in the original construction. The District Engineer will not delay needed maintenance for completion of any required mitigation, provided the DE and the applicant establish a schedule for the identification, approval, development, construction and completion of such required mitigation.

One commenter requested that they not be required to submit a new wetland delineation every five years because of the significant cost this would cause for local agencies. The Corps general policy is that wetland delineations are verified for no more than 5 years. In those cases where wetland delineations are required, the delineation must have been verified within the 5 year period. Once a delineation has been completed and verified, subsequent updates and verifications should, in most cases, be substantially less costly and time consuming. A wetland delineation would be required to establish the maintenance baseline. However, for normal maintenance, a wetland delineation would not generally be required, but may be on a case-by-case basis.

Time Limits and Maintenance Baseline: Many commenters requested that no time limits be set for maintenance intervals, only demonstration of need. One commenter pointed out that in some cases it may take a flood event to know that a facility needs maintenance, and little would be gained by disqualifying projects on the basis of long maintenance intervals. Another commenter added that it would be unfair to penalize older facilities that have received little maintenance over the years. A few commenters suggested that the baseline should be the design conditions with no set time limits for maintenance cycles, since such a time limit would be arbitrary and would not relate to the ecological value of a local project site. One commenter recommended that the baseline condition for measurement of impacts should be the ''as-built'' or newly constructed condition.

We concur that no time limits should be set for maintenance intervals and that it would be unfair to penalize older facilities. We have included design conditions and the ''as-built'' conditions as considerations in establishing the maintenance baseline. Details on the procedure and considerations for establishing the maintenance baseline are included within the NWP description presented later in this document under the ''Nationwide Permits and Conditions'' section. However, maintenance work to maintain the approved flood control capacity must be accomplished. If the project or the design capacity is effectively abandoned or reduced due to lack of proper maintenance, a new determination of a maintenance baseline would be required.

Regionalization: Two commenters suggested that maintenance of existing flood control projects should be exempted from regulation. A few commenters suggested replacing this NWP with each District developing river specific regional permits. One commenter suggested that this NWP would be more appropriate as a programmatic general permit because it would result in the same streamlining of the process while allowing for a public agency to administer a jurisdiction-wide channel maintenance program under pre-determined criteria for that state.

The activities authorized under this permit are not exempted under the Clean Water Act and are therefore regulated under section 404 of the Clean Water Act. We believe that it is appropriate to authorize the maintenance activities specified in the final NWP; however, districts can and are encouraged to identify appropriate regional conditions to ensure minimal impacts. We also agree that programmatic general permits could be a viable alternative in those cases where another program meets the objectives and requirements of the Corps regulatory program.

Endangered Species Act: A few commenters raised a concern over

possible impacts to Federally threatened and endangered species and recommended that sufficient evaluation with the federal agencies be completed before allowing a project to qualify for this NWP.

We believe the nationwide general permit condition addressing the avoidance of impacts to endangered species and compliance with the Endangered Species act is sufficient for protecting against such impacts. Furthermore, by verifying an activity is authorized under NWP 31, the Corps district will have made a ''no affect'' determination based on review of available data. If a project may affect an individual species, the Corps will initiate consultation under § 330.4(f). Furthermore, endangered species, if not already addressed in a Corps permit or Corps constructed project, would be addressed as a part of the determination of the maintenance baseline.

Definitions and Clarifications: A few commenters suggested that the title of this NWP be changed to ''Maintenance of Existing Flood Control Facilities'' rather than ''Projects'' to avoid any implications that it does not apply to existing or locally funded ''facilities.'' One commenter suggested that the word ''previously'' be deleted from the text because ''previously'' raises the question of whether or not the NWP applies to flood control facilities authorized and constructed subsequent to the effective date of the NWP, or only to those existing ''previously''. One commenter suggested that ''previously authorized'' be changed to ''initially constructed'' since the depths and configurations often have changed from the basic authorization.

We have changed the word ''projects'' to ''facilities'' as suggested. The term ''previously'' has been retained. We intend to include maintenance activities associated with flood control facilities in future Corps standard individual permits. We have modified the NWP to require the DE to consider the difference between the project authorized and actually constructed in his determination of the maintenance baseline.

One commenter felt that the term ''flood control'' project was too vague and needed to be clarified as to what could be considered a flood control project. We believe the term is sufficiently defined within the language of the final NWP.

Several commenters requested that clarifying language be added to the preamble stating that areas that were constructed in uplands are outside the purview of the Corps regulatory process provided they are maintained. Corps regulations for implementation of the regulatory program state that the Corps does not normally regulate artificial water bodies constructed in dry land, but reserves the right on a case-by-case basis to determine that a particular waterbody within this category is within the purview of our regulatory authorities. More detail on these provisions can be found at 33 CFR 328.3 and in the preamble to those regulations in 51 FR 41217. We will continue to monitor this need and provide additional clarification as necessary.

A few commenters requested that ''natural'' channels be defined to avoid misinterpretation. One commenter further suggested that ''natural'' be defined as a watercourse that has not been modified in order to increase its hydraulic capacity or simply a previously unaltered water course. Another commenter suggested that the wording of this NWP be revised to state that ''this NWP authorizes the removal of sediment and associated vegetation from flood control facilities, including natural channels. We believe the text of the final NWP, which reads: ''Only constructed channels within stretches of natural rivers that have been previously authorized as part of a flood control facility could be authorized for maintenance under this NWP,'' sufficiently clarifies those areas which can be maintained under this NWP.

One commenter felt the term ''maintenance'' is vague and that specific types of maintenance activities allowed should be fully described and limited to that which does not impact the environment and water quality. We believe the requirement for establishing a maintenance baseline satisfies this concern. It will establish the limits of the maintenance on a case-by-case basis.

32. Completed Enforcement Actions: The Corps proposed several changes to the NWP. We proposed expanding the scope beyond judicial enforcement actions to include agreements resulting from Corps negotiated settlements. We also proposed clarification that compliance with the underlying judicial or administrative decision or agreement is a condition of the NWP itself, and we proposed that EPA administrative settlement agreements could also be authorized by this permit.

Several commenters favored the addition of Corps non-judicial settlements to the scope of activities authorized by this permit. One commenter specifically stated that it would eliminate unproductive duplication of the Corps evaluation efforts. Another added that it would both streamline the process and expedite restoration work. A few commenters added that little is served by going through an individual permit process once the Corps is satisfied with restoration and mitigation being offered or required to resolve a violation. One commenter saw the benefit of enhanced negotiation with the Corps without judicial actions. A few commenters supported extending NWP 32 coverage to activities authorized under EPA administrative settlements as well as Corps settlements. Conversely, numerous commenters recommended that this NWP not be expanded or reissued. Many commenters were only opposed to the expansion of the NWP. Some believed that by including Corps-negotiated settlement agreements permit approvals would be made behind closed doors without the opportunity for public or resource agency comment and therefore would preclude the due process of public participation. One commenter was concerned that it would eliminate the opportunity for section 401 water quality certification for after-the-fact permit (ATF) activities that may have violated state water quality standards. The Corps will not forego its normal and required enforcement procedures at 33 CFR part 326 and 33 CFR 330.6(d)(2) and 330.6(e) prior to reaching a settlement agreement. The Corps has concluded that including agreements resulting from Corps negotiated settlements and EPA administrative settlement agreements would result in substantial work load reductions and eliminate duplicative efforts without any loss in resource protection. Corps settlement agreements receive thorough evaluation and are normally coordinated with the resource agencies. In those cases where the state does not certify this permit, the applicant will be required to obtain individual section 401 certification prior to the Corps final approval of the resolution.

Several commenters suggested ways to further expand this NWP and one commenter opposed any threshold restriction, provided the net environmental benefit was positive. Another commenter believed the NWP should be expanded to permit future impacts beyond those only for the purpose of mitigation, restoration, or environmental benefit. Some believed the thresholds of five acres of non-tidal or one acre of tidal wetlands were arbitrary and too high. Others believed that authorizing enforcement actions by NWP would violate the ''similar in nature'' and ''minimal impact'' standard of 404(e) of the Clean Water Act. One commenter suggested that unless the Corps settlement involved complete

restoration, it would be impossible to determine that the activities to be authorized under this NWP would be minimal impacts or to assess the cumulative impacts. The Corps has concluded that the existing thresholds and scope of the permit cannot be expanded because we could not ensure compliance with the ''minimal effects'' threshold for general permits. We have also concluded that the five acre and one acre thresholds are adequate for meeting the ''minimal effects'' criteria. The Corps believes that complete restoration will be achieved, except where full restoration is either not practicable or would result in unnecessary adverse environmental effects. Therefore, we do not believe greater than ''minimal adverse effects'' would result from this permit.

One commenter believed that the automatic revocation of the NWP, in case the permittee failed to comply with the settlement agreement or judicial decree, was too harsh and that they should be allowed to follow the normal revocation process. We do not believe this condition is too harsh given that the permittee, who violated the CWA and reached a settlement agreement with the government, once again violated the CWA. We believe that those individuals should be, once again, subject to enforcement/compliance regulations.

One commenter believed NWP 32 encourages citizens to break the law and noted there is no restoration for the impacts created by the violation. A number of commenters opposed this NWP because there were no limits as to potential impacts. One commenter stated this NWP would eliminate the 404(b)(1) needs and alternative analysis for projects up to five-acres. As stated in the proposed NWP, thresholds were established for the maximum size of the impact area and whenever possible, restoration of these areas will be required to minimize the impacts as appropriate and practicable. This NWP is mostly intended for those cases where the enforcement resolution has been reached and an ATF permit process is required. Although a 404(b)(1) off-site alternatives analysis is not required for an NWP authorization, on-site avoidance is required. Further, off-site alternatives may be considered, where appropriate, during the enforcement resolution prior to processing the ATF or this NWP authorization. NWP 32 is reissued with the changes discussed above.

33. Temporary Construction, Access and Dewatering: The Corps proposed adding the provision from recent guidance stating that this NWP could be used for construction activities not subject to either the Corps or U.S. Coast Guard regulations. We also proposed allowing the use of on-site dredged material for temporary fills, and deleting the last sentence of the permit, which stated that the permit did not authorize activities associated with mining activities or construction of marina basins which had not been authorized by the Corps.

The several comments received on this permit were nearly equally split between support for and position to reissue the permit. Many comments expressed concern about adverse impacts from structures and fill remaining in place without monitoring or enforcement. The Corps designed this permit to provide a shortened administrative process for construction-required activities that were not anticipated when the main project was authorized by another Corps permit (usually an individual permit) or by a Coast Guard permit. We have added authorization of activities where neither a Corps nor a Coast Guard permit is required but a temporary impact to waters of the United States occurs in association with work in the immediate area for an otherwise upland project. Structures or fills that remain in place cannot be permitted by this NWP. The NWP now clarifies that all activities authorized by this NWP must be removed or authorized by another permit.

One comment recommended that all fills and restoration be completed within 90 days of project completion. We have clarified the requirements of PCN (General Condition 13) such that the restoration plan will include a timetable for removal of the temporary structures and fills.

One comment concerned the interpretation of ''or for other construction activities not subject to the Corps or U.S. Coast Guard regulations'' as including maintenance which the commenter states is not regulated under 33 CFR 324.4(a)(2). The Corps NWP 33 is clear in its intent to authorize only activities that support some primary activity that has been permitted or does not need a permit. The exemption referenced authorizes maintenance and reconstruction of facilities, which means that it exempts only that part of the facility that was constructed in jurisdictional waters. NWP 33 authorizes access or construction techniques to perform the exempt reconstruction if that access or technique requires structures or fill outside the footprint of the facility.

One commenter recommended a dredging limitation the same as that required for NWP 19. The Corps believes that this is too restrictive for a temporary impact and would excessively lessen the use of this NWP.

A few commenters expressed concern for special aquatic sites with suggestions that: the permit require the impacted wetland be restored in 2 years, the impacted site be self-mitigating, the Corps ensure that wetland impacts can be reversed, and a maximum impact of ½ acre. We believe that all of these restrictions are not necessary. Through the PCN process the Corps will ensure that impacts are minimized to the maximum extent practicable.

Another comment expressed concern regarding downstream flooding. The NWP states that near normal downstream flows must be maintained and flooding minimized. Section 404-only Condition 6 also prohibits altering expected high flows.

One commenter suggested limiting restoration to special aquatic sites. The Corps has not adopted this recommendation because temporary structural fills in other waters of the United States, which are not special aquatic sites, also must be restored under this NWP. Another commenter suggested that there no be a notification for cofferdams and access ramps under some unspecified size. Another asked for the PCN to start at 100 cubic yards or 0.1 of an acre impact. We believe this is inappropriate as another permit has been issued for the main project and cumulative impacts need to be considered, including potential alteration of the purpose of the project. Also, even small cofferdams may have more than minimal impacts depending upon the resources of the waterbody. Construction activities for projects not requiring a permit may be authorized by non-notification NWPs if they apply.

Two other commenters recommended that signs be erected to warn boaters of construction activities and that this NWP not be used for river boat casino construction. These are very localized issues that can be dealt with through regional conditioning by the districts and divisions. If the Corps is aware of high recreation use, placing warning signs may be an appropriate condition for some specific NWP authorizations. NWP 33 is reissued with the proposed changes.

34. Cranberry Production Activities: The Corps proposed no changes to this NWP. Several commenters supported reissuance, but the great majority of those commenting on the permit requested revoking this NWP, based principally on perceived environmental impacts and because, according to the commenters, most cranberry producing states have denied water quality

certification. The Corps realizes that decreases of habitat value and water quality functions may occur in the conversion; however, the NWP requires mitigation to ensure no net loss of wetlands by acreage. Additionally, any district may regionally condition the NWP to restrict its use in particularly valuable wetlands. Some states, as noted by several commenters, have denied 401 water quality certification to ensure that the state can regulate impacts of local concern. Washington State, for example, initially denied certification for all actions under this NWP. Three years ago the state issued certification except for forested wetlands and areas that had never been in cranberry production historically. Denial by many states does not imply that a NWP is causing more than minimal adverse effects, but simply that the state may have concerns regarding water quality.

A few commenters requested removing the no net loss requirement for purposes of water quality and more efficient harvesting through the construction of dikes. The Corps believes that the mitigation required is necessary to ensure that no more than minimal adverse effects will occur. The Corps believes that extensive construction of dikes would likely result in more than minimal adverse effects, and thus requires evaluation through the individual permit process.

One commenter stated that upland alternatives should be selected. Although it has been demonstrated that cranberries can be cultivated in former uplands (cranberry bogs are wetlands because of the hydrology that must be maintained), this is technically difficult and typically would not be practicable. This is particularly true recognizing that many operators are small family businesses.

One commenting organization stated that Section 401 did not apply to cranberry bog construction because it is a non-point pollution source. The activities regulated by the Corps under NWP 34 involve discharges of dredged or fill material associated with expansion, enhancement or modification of the cranberry bogs. These discharges of dredged or fill material are the same as any other fill pad or land leveling operation. These types of activities are point source discharges and a 401 water quality certification is required.

Two commenters recommended adding taro production to this NWP. Taro is grown in Hawaii and other South Pacific islands. We believe this is a region-specific problem and the Corps Honolulu District has the option of developing a regional general permit, if appropriate.

In order to verify compliance with the terms of this NWP, we have added the requirement to provide a wetland delineation with the notification. NWP 34 is reissued with the modifications described above.

35. Maintenance Dredging of Existing Basins: The Corps proposed no changes to this NWP. One commenter indicated that clarification is needed to unambiguously define and limit what is meant by canals, basins and slips. This is a section 10 NWP and the term canal in this instance is related to navigation. Therefore, flood control or other canals that do not normally support navigation are not covered by this NWP. The term basin is also intended to relate to navigation, such as a marina. A marina basin is defined as the open water portion of a marina which is normally bounded on one or more sides by uplands or structures (i.e., bulkheads, walkways, floating or stationary piers and/or breakwaters). A slip is the open water area where an individual boat is moored and is normally bounded on one or more sides by uplands or structures (e.g., bulkheads, walkways, piers, piling, etc.). We have modified the permit by replacing the term ''canals'' with the term ''channels''. We have made this change to clarify our intent to allow maintenance dredging of navigational channels connected to marina basins.

One commenter suggested that the NWP be broadened to include maintenance dredging of previously authorized intake and discharge structures and canals for electric power plants. The commenter added that this activity is infrequent, typically requiring maintenance dredging no more often than every five to ten years. We are not adding such canals because their primary purpose is not to support navigation.

A few commenters expressed concern about the method of disposal related to waste discharge requirements of boats using the area and 401 water quality certification. The states review water quality concerns under section 401 of the Clean Water Act and boats must meet discharge requirements established by the Coast Guard. Moreover, this NWP is not for construction of marinas, but for maintenance dredging of their basins and access canals.

One commenter suggested that each Corps district incorporate seasonal restrictions to limit impacts to anadromous fish. Another commenter stated that the NWP should not be used to remove natural gravel deposits or woody debris caused by flooding which may directly impact stream flow and may affect anadromous fish. We believe that these issues can be addressed through regional conditions to this NWP or by activity-specific conditions required by the DE, where necessary. One commenter expressed concern over the possibility of resuspension of pollutants accumulated in the sediments of marina basins during such maintenance activities. The Corps shares these concerns and is therefore, with this publication, requiring that the Division Engineers, through the recommendation of the DEs, regionally condition this NWP to exclude marinas where there is a high potential for resuspension of pollutants that may adversely affect water quality. NWP 35 is reissued with clarifications discussed above.

36. Boat Ramps: The Corps proposed no changes to this NWP. One commenter suggested that this NWP be subject to notification requirements. Another commenter suggested that the NWP would encourage the construction of individual boat ramps. A few commenters suggested that mitigation be required for lost special aquatic sites and habitat. A few commenters requested additional conditions to avoid impacts to endangered species and fish spawning seasons, to place unpolluted fill material, and to limit construction periods. A few commenters suggested modifications to the size limits of this NWP.

The Corps notes that no discharge of fill material would be allowed into special aquatic sites under this nationwide permit, and the boat ramps authorized are very small. Given this and the discretionary authority provisions, we believe that the notification requirement is not necessary to ensure minimal adverse effects. The NWP, as written, adequately balances the need for public access to the nation's waterways while protecting aquatic resources. The NWP specifies that unsuitable material that causes unacceptable chemical pollution, or is structurally unstable, is not authorized. We believe the general and special conditions in regard to endangered species and spawning areas, respectively, are adequate. Additional measures have been added by the Corps as regional conditions to address specific issues. NWP 36 is reissued without change.

37. Emergency Watershed Protection: The Corps proposed no changes to this NWP. A few commenters wrote to state their general support for this nationwide permit. Several commenters believe that the NRCS is misusing and abusing the Emergency Waters Protection Program

(EWPP) and have suggested imposing a time limit after the occurrence of the natural disaster/emergency situation for the project to qualify for this nationwide permit. It is not always possible to immediately determine the full scope of the damages caused by an individual event. The Corps considers whether or not the material to be removed was a result of a flood event through the PCN process. It is the responsibility of the NRCS, not the Corps, to determine whether the project complies with their program authority. It is the Corps responsibility to review the project and concur that the proposal will result in only minimal impacts and otherwise comply with the terms and conditions of the NWP. Some commenters suggested that we expand this nationwide permit to include all emergency response work as a result of a state or Federal Disaster Declaration and eliminate the notification requirement. After each natural disaster/emergency situation, those responsible for performing this work must coordinate with all appropriate agencies to ensure not only an expeditious response to the situation, but compliance with all applicable laws. Most work of this type is authorized under Nationwide Permit 3. For EWPP projects, notification will continue to be required to ensure that the terms and conditions are met and only minimal adverse effects will occur. NWP 37 is reissued without change.

38. Cleanup of Hazardous and Toxic Waste: The Corps proposed clarification as to which projects approved under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) do not require authorization under sections 10 and 404.

Four commenters noted that CERCLA does not absolve the Corps of its responsibilities under section 404 or section 10, and/or recommended inclusion of language that states that section 404(b)(1) compliance is still necessary unless EPA specifically grants a waiver of ''applicable or relevant and appropriate requirements'' compliance. One of these commenters also stated that the final permit should indicate specifically the substantive requirements that would apply to CERCLA actions under this nationwide, and whether the Corps intends to encompass all CERCLA actions. One commenter recommended deleting the last sentence of the proposed language regarding CERCLA exemptions. EPA notes that the new language proposed for nationwide permit 38 regarding CERCLA exemptions refers to section 121(e)(1) of CERCLA for activities carried out under that section, which only exempts from permit requirements activities that are conducted ''entirely on site.'' They recommend modifying the last sentence of the proposed language to read ''Activities undertaken entirely on a CERCLA site by authority of CERCLA * * *.'' They further note that section 121(e)(1) contains the restriction that the activity must be ''carried out in compliance with this section.'' We concur with this clarification and have added the suggested language.

One commenter stated that nationwide permit 38 illegally delegates the Corps responsibility to protect wetlands to other Federal and state agencies that have very different missions. The Corps has not delegated any regulatory responsibility. The applicant must notify the Corps according to the notification procedures and coordination with other pertinent agencies would be conducted. Appropriate measures to mitigate adverse environmental impacts would be required by the Corps if necessary to ensure that the adverse effects are minimal. This commenter also states that the proposed exemption for EPA-approved or required projects under Superfund that do not require a section 404 or section 10 permit has no statutory basis in the CWA or CERCLA. We note that section 121(e)(1) does specifically allow for exemptions from section 404 and section 10, provided the activities are conducted entirely on-site.

This commenter also notes that no limits are imposed by this nationwide permit and that this violates section 404(e). We disagree. First, there are multiple environmental reviews involved in CERCLA clean up activities. Second, a large project can have minimal adverse effects depending on the functions and values of the impacted waterbody. This commenter further questioned the validity of the information provided in the **Federal Register** notice on types of potential contamination sources, assumptions made regarding quality of containment technologies, compliance with NEPA by lack of appropriate specificity, and lack of demonstration of compliance with the 404(b)(1) Guidelines by leaving all standards of approval to EPA or state or local regulators. The commenter also encourages the Corps to remain involved to ensure appropriate implementation of section 404 and section 10 requirements with the other parties involved. We believe that the information and project specific evaluation is best left to a case-by-case review by EPA and the Corps through the PCN process. We further note that under EPA's CERCLA guidance, provisions of the section 404(b)(1) Guidelines are considered by EPA.

This commenter recommended nationwide permit 38 not be reissued and that the Corps should conduct its regulatory responsibilities concurrently with the other agencies.

We believe that the NWP ensures that wetlands functions and values are appropriately protected. We also believe that the nationwide permit as written provides for such concurrent evaluation, coordination, and oversight.

One commenter recommended not reissuing this nationwide permit or narrowing it to avoid allowing the dredging of hazardous and/or toxic materials that have settled in river bottoms. One commenter recommended that projects that may affect wetlands or other special aquatic sites include a mitigation plan sufficient to offset impacts. Another commenter noted that specific mitigation requirements are not mentioned under this nationwide permit, and notes that mitigation for lost functions and values should be required if such functions and values were present on the site prior to cleanup. One commenter stated that this nationwide permit should be limited to projects impacting less than one acre of waters of the United States. The notification procedure allows the relevant agencies to provide comments regarding concerns regarding potential contamination issues or to identify mitigation needs. If the Corps determines the project is likely to result in more than minimal adverse effects, appropriate mitigation will be required to reduce adverse environmental effects below the minimal level, or the DE may notify the applicant that the project does not qualify for authorization under the nationwide permit and instruct the applicant to seek authorization under an individual permit. Restricting this nationwide permit to projects of less than one acre of impacts to jurisdictional waters of the United States would unduly limit its application. We do not believe that such a restriction is warranted provided appropriate mitigation is required by the Corps through the PCN process.

One commenter supported the proposal to clarify the scope of this nationwide permit by recognizing that activities conducted under the authority of CERCLA do not require section 404 or section 10 permits and recommended that language be provided that expressly notes that the notification procedure is not applicable for activities conducted under CERCLA authority. The language of the NWP explicitly states that Corps section 404 and section 10 permits are

not required. Thus, notification to the Corps is not necessary for those projects undertaken under authority of CERCLA.

Two commenters recommended that nationwide permit 38 include activities undertaken under authorities other than CERCLA, such as Resource Conservation and Recovery Act (RCRA) or state Superfund programs. As stated in the current and proposed wording, actions performed, ordered, or sponsored by a government agency with established legal or regulatory authority are authorized under this nationwide permit.

One commenter noted that section 401 water quality certification and the Coastal Zone Management Act (CZMA) consistency could be granted without additional regional conditions. Such determinations will be made by each individual state. NWP 38 is reissued with the clarification discussed above.

39. Reserved.

40. Farm Buildings: The Corps proposed correcting the reference to the ''minimization'' condition to reflect its current title, ''mitigation'' condition. We also proposed deletion of ''agricultural related structures necessary for farming activities'' to clarify that we intend the NWP to only authorize farm buildings such as agricultural sheds, supply storage, and barns on a farm or ranch. The NWP is not intended to authorize production nor warehousing type facilities.

One commenter recommended that saltflats or saltponds be added to the wetland types excluded from this NWP due to their inherent values for sediment retention and wintering shorebird and waterfowl habitats. Two commenters recommended deleting the reference to exclusion of prairie potholes, playa lakes and vernal pools to include all wetlands converted or in agricultural production prior to December 23, 1985. The commenter also recommended deletion of the term ''farmed wetlands'' to remove a potential source of confusion, and recommended adding the phrase ''and agricultural related facilities necessary for farming activities'' at the end of the first sentence.

We believe these suggestions would serve to expand this nationwide permit to allow any and all ''agricultural related facilities.'' Restricting this nationwide permit to farm buildings is the intent. We do not believe it is necessary to include any and all possible facilities to be found on farms across the United States. Restrictions on farmed wetlands are appropriate because they are still jurisdictional waters of the United States. The 404(f) exemptions for normal farming activities involve working the land and farm machinery access, not construction of buildings. Prior-converted croplands are not jurisdictional unless wetland characteristics develop upon abandonment of the land. Exclusion of prairie potholes, playa lakes and vernal pools from the scope of the permit is appropriate because of the high ecological values typically associated with these waters. While we recognize the high resource values inherent in many saltflats and salt ponds, these areas typically are not farmed and their exclusion should be considered on a regional basis by the Corps districts.

Several commenters stated that this NWP violates the minimal impact standard of section 404(e). One commenter supported the proposed change provided there were further clarifications of purpose. Specifically, this commenter recommended the permit language should refer to ''foundations and building pads for farm buildings,'' it should refer to farmed wetlands as those wetlands that were in agricultural crop production prior to December 23, 1985, and are currently in agricultural use, and it should refer to discharges associated with a ''single and complete project.'' Another commenter noted that the permit language allows discharges into jurisdictional wetlands that were in agricultural production prior to this date, but there is no explicit requirement that the area still be in agricultural production. Many stated the proposal to limit this nationwide permit to only ''farm buildings'' was not simply a clarification, but a reduction in coverage of the NWP, and were opposed to the modification without data supporting the need for change. One commenter recommended limiting this NWP to only farm homes and limiting impacts to only 0.1 acre. Many commenters also noted that the placement of non-water dependent structures in wetlands is inappropriate. One commenter recommended that any discharge into jurisdictional wetlands be compensated by an approved mitigation plan coordinated with the appropriate resource agencies. One commenter had no objection to issuance as proposed provided it was regionally conditioned to apply only to isolated wetlands. One commenter recommended that this NWP not be reissued due to impacts to wetlands already sustained in his region, and because the NWP language provides no guidance on how the one-acre limit is interpreted, provides no definitions of terms such as ''necessary,'' ''agriculturally related,'' and ''minimum''.

The NWP only applies to farmed wetlands that are currently in agricultural production. We believe that the acreage limitations will ensure that impacts to farmed wetlands will be minimized. We further believe that notification and delineation of special aquatic sites is unnecessary because this nationwide permit applies only to farmed wetlands that are currently in agricultural production.

Many commenters opposed the reissuance of this NWP without further clarification of the intent. The majority of the concerns related to the potential for housing animals or agricultural chemicals in or adjacent to wetlands with the attendant concerns for contamination of local water sources from runoff and requested that such structures be excluded. One commenter noted that this NWP does not require notification to the Corps or other agency and could potentially render a potable water source unfit for human consumption. Three commenters requested language that made it clear that the permittee would still be required to obtain all other required permits such as waste water and waste management permits. One commenter recommended reissuance of this NWP only if it were conditioned for best management practices for size thresholds, pollutant discharge standards, and monitoring protocols. The Corps shares the concerns for potential adverse effects to water quality from runoff and leaching of agricultural chemicals and animal waste products. Therefore, we have added a Corps-only PCN requirement for the placement of any farm building within 500 feet of a flowing stream or waterbody. This PCN will be used by the DE to determine if adverse effects to water quality may result from the placement of the farm building. If the DE concludes that the project, as designed, may adversely effect water quality, additional protective measures, including relocation of the proposed project, may be required.

Proposed New Nationwide Permit A. Moist Soil Management for Wildlife: This proposed permit is discussed above in the ''Discussion of Public Comments and Changes'' section and included below in the ''Nationwide Permits and Conditions'' section as Nationwide Permit 30: ''Moist Soil Management for Wildlife''.

Proposed New Nationwide Permit B. Food Security Act Minimal Effect Exemptions: The majority of comments on NWP B recommended waiting for review of the regulations implementing the 1996 Amendments to the Food Security Act of 1985 (FSA) before

issuing this nationwide permit. The Corps had anticipated that the regulations would be final by July 1, 1996; however, it was not published final until after the end of the comment period for the proposed nationwide permits. Therefore, we intend to re-propose NWP B in the **Federal Register** at a future date. Of the many comments received, approximately half requested that this nationwide permit not be issued, mostly based on perceptions that the permit would result in adverse impacts to wetlands, while the other half supported it. The comments already received will be considered along with those received in response to our future notice of proposed issuance of this nationwide permit.

Proposed New Nationwide Permit C. Mining Operations: A large number of comments were received on this proposed permit. Through our review of this proposal we found sand and gravel mining operations and recreational mining activities vary greatly across the country, not only in scope but in types and levels of impacts as well. We believe that the development of regional general permits, including programmatic general permits based on state or regional programs, will provide a more effective process for dealing with the differing conditions of various geographical areas of the country. It would not be productive to attempt to specify limits to reduce the individual and cumulative impacts of a NWP for in stream mining to a minimal level when a majority of the proponents indicate that the permit is of little value unless the allowable level of impact is increased. Corps districts and divisions will be encouraged to develop regional general permits for these activities. Proposed nationwide permit C is not issued.

Proposed New Nationwide Permit D. Maintenance of Existing Flood Control Projects: This proposed permit is discussed above in this ''Discussion of Public Comments and Changes'' section and included below in the ''Nationwide Permits and Conditions'' section as Nationwide Permit 31: ''Maintenance of Existing Flood Control Projects''.

IV. Comments and Responses on Nationwide Permit Conditions

A. General Conditions

1. Navigation: The Corps proposed no changes to this condition. There were no comments received on this condition. This condition is adopted without change.

2. Proper Maintenance: The Corps proposed no changes to this condition. Two commenters suggested adding the word ''facilities,'' regarding those activities that are required to be maintained. The Corps authorizes maintenance of structures or fill within its jurisdiction under sections 10 and/or 404. We do not regulate the maintenance of facilities built on the structure or fill. For example, if a business facility (building) on the upland is not ''maintained,'' while the barge loading dock is properly maintained, the Corps would not take action regarding maintenance of the building. To avoid any confusion, the Corps has not added ''facilities'' to this condition. This condition is adopted without change.

3. Erosion and Siltation: The Corps proposed no changes to this condition. Several commenters suggested including state and local erosion and sediment control laws in the General Conditions. Corps permits do not override or obviate the need to comply with state and local erosion and siltation control laws. Additionally, the Corps has no authority to enforce state and local laws. Therefore, the Corps believes it is unnecessary and inappropriate to include state and local laws. This condition is adopted without change.

4. Aquatic Life Movement: The Corps proposed no changes to this condition. A few commenters indicated that projects authorized under an NWP that substantially disrupts aquatic life movements would not satisfy minimal impact criteria and should be considered only through individual permitting procedures. With the current wording of this condition, if a project proposed for an NWP does substantially disrupt aquatic life movement, this general condition is not met and the project cannot be authorized under a nationwide permit. Additionally, it was requested that the phrase ''unless the activity's primary purpose is to impound water'' be deleted. We believe there are impoundment projects which would substantially disrupt the movement of specific individuals of aquatic life, but which would not adversely affect the populations of the species nor have more than minimal impacts on the aquatic environment. This condition is adopted without change.

5. Equipment: One commenter suggested adding to this condition that all equipment be stored in uplands to the extent practicable. We believe this condition is sufficiently clear as stated and applies only to equipment ''working in wetlands''. Storage of equipment in wetlands is not addressed because it is not authorized. This condition is adopted without change.

6. Regional and Case-by-Case Conditions: The Corps proposed no changes to this condition. There were no comments received on this condition. We have added a statement that such conditions will also include those imposed by states or tribes under Section 401, which clarifies the current practice.

7. Wild and Scenic Rivers: We proposed to allow the use of NWPs in a component of the National Wild and Scenic Rivers system after coordination with the managing agency has resulted in a determination that the project will not adversely affect the status of the river. Most comments supported the proposed change. No objections to the proposed change were received. Several commenters requested that we add ''U.S. Fish and Wildlife Service'' after the ''e.g.'' in the last line because they administer 2 rivers in the lower 48 states and 7 rivers in Alaska. We will add this to the nationwide permit condition. Comments were received requesting the addition of the following statement:

> This has no effect on procedures established to notify river management and study agencies of pending applications for permits, including conditions negotiated for General Permits by the Corps and those agencies. The proposed activity shall not begin until the applicant has been notified by the District Engineer that the requirements of the Wild and Scenic Rivers Act have been met.

None of the nationwide permits or conditions override or obviate the need for any other Federal agency's requirements for permits or coordination. The Federal agency responsible for managing the affected waterway must determine whether all requirements of the Wild and Scenic Rivers Act have been met. The applicant may make all required coordination with the appropriate agency without involving the Corps of Engineers if there is no notification requirement for the nationwide permit authorizing the proposed project. If the responsible Federal agency determines the project, as proposed, does not comply with the Wild and Scenic Rivers Act, individual processing of the application is required. A comment was also received requesting that the Federal management agency be required to coordinate with the applicable state resource agency on projects proposed for authorization by nationwide permit in Wild and Scenic River areas or study areas and that any state permits required for a proposed project must be issued *before* the Corps provides authorization by a nationwide permit. The responsible Federal agency is required to complete all coordination

of activities as specified in their regulations. It is not appropriate for the Corps to instruct these agencies regarding their program requirements. This condition is adopted as proposed with the inclusion of the U.S. Fish and Wildlife as a Federal management agency.

8. Tribal Rights: The Corps proposed no changes to this condition. One commenter requested inclusion of language to protect cultural resources, including those protected by the Native American Graves and Repatriation Act, in addition to tribal rights. The Native American Graves and Repatriation Act does not apply directly to the Corps regulatory program. This law is applicable to federal agencies conducting work on federal lands but does not apply to private citizens conducting work on private lands. However, many Native American cultural resources are protected by tribal rights and therefore have been, and will continue to be, considered under this condition. This condition is adopted without change.

9. Water Quality Certification: The Corps proposed no changes to this condition. One commenter suggested that section 401 water quality certification and the section 404 authorization procedure should be combined for Nationwide Permit 26. If the appropriate State agency issues or waivers section 401 water quality certification for any Nationwide Permit, the authorization process has been effectively combined. The Clean Water Act specifically separates these authorizations so that States may place more stringent controls on projects to reduce water quality impacts as perceived by the State and not limit the review process to the Federal perspective. This condition is adopted without change.

10. Coastal Zone Management: The Corps proposed no changes to this condition. A few commenters indicated that the current announcement process for Nationwide Permits did not follow Federal consistency procedures and was not in compliance with Coastal Zone Management requirements. One commenter suggested conditions that would allow concurrence on consistency determinations and indicated that the Nationwide Permits should be revoked for a State where such conditions for Coastal Zone Management are not present. Many commenters stated that determination of inconsistency with Coastal Zone Management should invalidate a permit; and that a requirement for individual reviews should not be adopted. If a Coastal Zone Management concurrence determination is not provided for a specific nationwide permit, the project may not proceed until and individual CZM consistency determination has been received for the specific proposed project. The Corps decision that the project will have minimal impact is not affected. However, the agency responsible for the concurrence determination will review each project on a case-by-case basis. If the project specific concurrence determination is denied, the project may not proceed and the NWP is denied without prejudice.

One commenter believed that a Coastal Zone Management concurrence determination should not apply to flood control maintenance activities more than 100 feet upstream of the designated Coastal Zone. The commenter stated that the project is outside the designated coastal zone, this condition does not apply. The Corps must determine whether or not the impacts of a project would affect a state's coastal zone. If project impacts would affect the States coastal zone, than a consistency concurrence is required. This condition is adopted without change.

11. Endangered Species: Although no changes to this condition were proposed, we have made the change of adding language specific to the take of endangered species as discussed below. Several commenters stated that the Corps must determine compliance with section 7 of the Endangered Species Act and that the applicant will not have sufficient knowledge to make such a determination. These commenters assert that by delegating the section 7 ESA responsibility, the Corps NWP program is not in compliance. A few commenters requested that the endangered species condition not apply to species ''proposed for listing''. Several commenters requested that a public notice be issued for all proposals to obtain public input and environmental review, or that a universal PCN should be shared with resource agencies. A few commenters were concerned that section 7 has never been implemented under the NWP process and that NMFS and USFWS should be consulted prior to final action. A few commenters recommended that the Corps clarify that authorization of a project by an NWP does not authorize the taking of an endangered or threatened species. We will add a statement to this condition to clarify this issue.

Issuing a public notice or sharing universal PCN's with resource agencies for input on all proposals would be unduly burdensome to the Corps and the regulated public, and would not necessarily enhance protection of endangered species. The Corps believes that the procedures at 33 CFR 330.1(e) and this condition ensure compliance with the Endangered Species Act (See general discussion at the beginning of the preamble). Finally, the Corps does conduct section 7 consultations, on both standard individual permits and nationwide permits, to ensure ESA compliance and, as stated above, we are entering into formal programmatic section 7 consultation for the NWP program. The inclusion of species ''proposed for listing'' is identified under the Endangered Species Act and is used in that context. This condition is adopted as discussed above.

12. Historic Properties: The Corps proposed no changes to this condition. Several commenters do not believe this condition ensures compliance with section 106 of the National Historic Preservation Act (NHPA) or its implementing regulation (36 CFR part 800). These commenters encourage development of a process which will pre-identify and evaluate historic properties and cultural resources. Some commenters suggested limiting this condition to those activities which may ''adversely'' affect historic properties. We believe that the Corps procedures outlined in this condition comply with the requirements at 33 CFR 330.4(g) and at 33 CFR part 325, appendix C for protection of historic properties, which implements 36 CFR part 800, and fully satisfy the requirements of the NHPA. Furthermore, our experience with authorizing activities by nationwide permit supports our position. We do not believe an additional or revised process is necessary. To change the condition to reduce the threshold for initiating the historic property process from ''may affect'' to ''may adversly affect'' would not be appropriate or in compliance with Corps regulations. The ''may affect'' threshold provides for a process to determine the affect or no affect on historic properties. The ''not adversely affect'' determination would be decided during the process. If during that process a determination is made that the activity will not adversly affect then the project could be authorized by the NWP. This condition is adopted without change.

13. Notification: We proposed several changes to this condition. In summary, we proposed to: (1) Contact the agencies on behalf of the applicant, (2) discontinue PCN coordination with the agencies on NWPs 5, 7, 13, 17, 18, and 34, but allow Regional Directors or Administrators to request coordination, (3) increase the notification time period for NWP 26 from 30 to 45 days, and (4) notify the agencies on NWP 29 and proposed NWP D (now NWP 31). Many

commenters believe that notifying the agencies is not necessary, many others believe it is necessary. Some commenters like the proposed notification reductions, while others expressed concern. A number of commenters believe that there should be no notification requirements at all. The primary reasons given were that it would cause permit delays and that it was unnecessarily burdensome to the regulated public. Many other commenters believe there should be notifications. The reason for notifications are to assure minimal impacts, and to ensure compliance with the National Historic Preservation Act and the Endangered Species Act. We believe that although comments from the agencies are often helpful in the permit evaluation, the value added to the Corps decision for NWPs 5, 7, 13, 17, 18, and 34 is not adequate to continue the process. We believe that the limited resources from all agencies are better utilized by focusing on projects with potentially greater environmental impacts.

Many commenters raised concern that, by applying compensatory mitigation in the context of a NWP, the Corps authorizes activities that, but for the mitigation, may have more than minimal adverse environmental effects. Those commenters were concerned that the CWA requires that only activities with minimal effects may be authorized by a general permit. Activities that have more than minimal adverse effects are subject to the individual permit process and the associated analysis of alternatives, individual public notice procedures, and other aspects of individual review that help to ensure that potential adverse effects are fully avoided and minimized before any activity is approved.

Given these concerns, the Corps will be considering whether or not modifications to the mitigation provisions of the regulations are appropriate and will be meeting with other Federal agencies to discuss this issue. In the interim, the Corps is seeking specific comment on the use of compensatory mitigation in the context of the Nationwide Permit program and any recommendations for modification to the mitigation provisions. Should the Corps determine that revision to this policy is appropriate, a rulemaking process to change the regulations at 33 CFR part 330 may be necessary. This process would include notice and full opportunity for public participation.

A few commenters suggested that NWP 12 needs delineation of special aquatic sites. We disagree. Fills associated with NWP 12 are temporary in nature and the areas impacted are to be returned to original contours and elevations after the work is completed for projects not subject to the PCN process. The Corps evaluates those projects subject to the PCN process and will determine whether there are substantial problems regarding jurisdiction.

Several commenters requested we increase the time allowed for the agencies to respond. As noted in the preamble section on NWP 26 notification, we will allow the agencies an additional 7 calendar days by extending the maximum additional time the agency can request to 21 calendar days. The agency coordination times for all other NWPs will remain 5 and 14 days. We believe these modifications to the current times are responsive to the greatest area of concern, NWP 26, while not increasing delays for the regulated public where there is less potential for more than minimal adverse effects.

One commenter suggested that notification be required for NWP 23 because of the potential for large projects and significant wetland impacts. NWP 23 activities, by their definition, are actions ''which neither individually or cumulatively have a significant effect on the human environment,'' have already gone through a NEPA analysis, and have already had a public review and comment period when they were first proposed for inclusion under NWP 23. Furthermore, in some specific cases a PCN is required in the individual Corps approval of another agency's categorical exclusions.

One commenter noted that there are no consequences for an incomplete notification, thus, it is not in the applicant's interest for him to raise all the issues that may affect his proposal. The commenter suggested that the resource agencies have information and resources that would help identify these issues and it would be advantageous to the program for the Corps to coordinate projects with them before making a complete determination. The consequences for submitting an incomplete notification is a delay in the Corps evaluation, and hence the authorization, of the project proposal. The Corps initial review of PCNs includes a determination on whether the PCN is complete. Since most applicants are trying to reduce the amount of delay as much as possible, we believe the incentive to submit a complete application is adequate.

A number of commenters provided recommendations for improving the coordination among agencies at the local level. The Corps is with this final package we are issuing today directing substantial increases in coordination and communication at the district and division level. This increased coordination will be part of developing regional conditions for the reissued NWPs, developing replacement NWPs for NWP 26, endangered species compliance, and working with the States. However, we also suggest that individuals and agencies contact their respective Corps districts to provide those recommendations.

One commenter suggested that the Corps notify the applicant upon receiving the PCN and indicate whether it was complete and when a decision would be made. The applicant will be notified if the notification is incomplete and will be informed regarding what information is necessary for the notification to be considered complete.

Several agencies recommended PCN's for NWP 5, 7, 13, 17, 18, and 34. The commenters indicate that major impact projects have been proposed involving NWP 7 (outfalls) and NWP 13 (bank stabilization). A commenter requested that the following list of permits be coordinated with resource agencies: 7, 12, 13, 17, 18, 21, 26, 27, 29, 34, 35, and C. Another commenter requested agency notifications for 7, 13, 14, 18, 21, 26, 33, 37, 38, and the new NWPs. We have carefully reviewed all of the requests for changes to the NWPs for which notification under General Condition 13 has been requested. Based on this review, several NWPs will involve notification coordination with the resource agencies, several will be Corps-only review of the PCN, and several are subject to the optional process for agency coordination. Some projects authorized under NWP 7 or 13 involve major impacts outside of the waters of the United States. These major impacts are not within the Corps authority to regulate or control.

Several commenters suggested changing the terminology of PCN back to PDN. The terminology causes confusion because the regulated activity is a discharge and construction implies work on high ground. The term PCN (pre-construction notification) has been adopted over the term PDN (pre-discharge notification) because many of the NWPs are not authorizing a discharge, in Section 404 waters, but are authorizing work in navigable, Section 10, waters. Since these do not involve authorization of a ''discharge'', we believe the term ''construction'' is more appropriate for all NWPs. The Corps does not control or regulate activities in uplands, including when construction is initiated, beyond these limited

circumstances identified in 33 CFR part 324 appendix B, Scope of Analysis.

A number of commenters believe that the requirement for the applicant to notify the FWS and the SHPO speeds up their permit by allowing them to develop alternatives and mitigation measures. They believe that if the Corps is tasked with this responsibility, their permit will be delayed and the applicant would lose control of the schedule. They also believe that if the proposal is adopted, these agencies will not be willing to work directly with the applicant and will only work through the Corps. One commenter expressed concern that the reason for not requiring applicants to contact the SHPO was because the SHPO did not want to work directly with the applicants. The commenter suggested that this was counter-productive and that the Corps should explore ways to ensure that such organizations cooperate with the permit applicants early in the process. These agencies have requested that the Corps send the PCNs to them rather than direct contact between them and the applicant. This process ensures that these commenting agencies only review active, complete applications. This process does not preclude an applicant from contacting the agencies for information.

One commenter recommended that the SHPO be allowed a 30-day review to ensure that historic resources were adequately addressed. Another stated that the SHPO would not do the Corps work and that data on potential historic properties should accompany the transmittal of the PCN, and that any deadlines for response to the Corps begin after the receipt of adequate information. The Corps believes that the current process provides a reasonable amount of time for the SHPOs to provide their views. The intent of the PCN is to identify if there is a potential historic property problem, not to completely resolve such problems. If a problem regarding an effect on a historic property is identified during the PCN process, then the Corps will instruct the applicant that they cannot proceed with the project until coordination to resolve the problem is completed.

Several commenters stated that the notification process does not allow them to comment on proposed projects. They don't believe that the provisions in the CWA are being met, since the agencies and the public have no opportunity to comment. The Corps regulations establish a process for publishing proposed nationwide permits for public comment (33 CFR part 330). Based on this process, the Corps issues NWPs that have procedural steps to ensure agency coordination and the ability of the Corps district to require a full public interest review, where the Corps believes such review is necessary, through its discretionary authority.

A couple of commenters suggested a time threshold for Section 401 water quality certification that was in line with the other agency review times. The Corps regulations provide that project specific section 401 evaluations will generally be completed within 60 days. However, districts may, working with the States, extend this time period not to exceed 1 year. We do not propose to change this process.

One commenter suggested that extensions be provided to commenting agencies, or an IP be required, in situations where delays are caused by insufficient or inaccurate maps and depiction of proposed action. This commenter also indicated that the mitigation option of the contribution of monies to a wetland trust fund be more clearly discussed. This commenter also suggested that the Corps apply notification condition 13(b)(5) (restoration plan for temporary fill sites) to NWP 12 and 15, both of which allow the temporary placement of dredged or fill material. Finally, this commenter suggested that the Corps extend the initial comment period for resource agencies to 7 calendar days for all NWPs, and eliminate the prohibition on the Corps responding to agency comments. The Corps does not coordinate PCNs with resource agencies until the PCN is considered complete, so that the basic information is adequate for review. Furthermore, we believe it is essential to provide an answer to applicants within the PCN period of 30 days (45 days for NWP 26). We do not believe that it would be beneficial to explicitly define in lieu fee systems nor wetland land trusts. These vary around the country and we will expect our districts to ascertain whether or not a given situation will reasonably ensure quality and successful mitigation. We do not believe that any additional restrictions are necessary for either NWP 12 or NWP 15. We have already added substantial additional restrictions to NWP 12. Should a problem arise with NWP 15, either the Coast Guard or the Corps will address it on a case by case basis. We do not believe that it is necessary to extend the initial comment period for the resource agencies from 5 to 7 days. This period is simply to determine whether or not site specific, substantive comments will be provided. Finally, we do not believe that the notification process or environmental protection would be advanced by responding to resource agency comments on PCNs. If any agency wishes to know how the Corps utilized their comments, that agency can call the Corps district and discuss the specific project. We encourage this type of informal coordination.

One commenter suggested that inclusion of different times regarding agency review and response to applicants for different nationwide permits would create a lot of confusion. We carefully considered the concern that variable comment periods might be confusing to the commenting agencies or the regulated public. However, under our revised NWP 26, we expect a substantial increase in the number of PCNs, and the Corps is directing its districts to carefully consider project impacts and potential mitigation on most of them. Therefore, we believe the additional time is necessary for NWP 26.

One commenter suggested that affected tribes be included in the notification process. We believe that since the tribes are inherently aware of all Corps regulatory matters on tribal lands, additional notification is unnecessary. Furthermore, we believe that NWP General Condition 8, ''Tribal Rights,'' is sufficient to address tribal treaty rights issues, and District Engineers will notify the tribes regarding these treaty rights, as necessary.

We believe that the review of PCNs by the state does provide valuable information and we have retained that provision. However, the optional coordination procedure is made available for activities that we believe will typically be clearly minimal. We believe that allowing this optional procedure only for the Federal resource agencies will adequately ensure appropriate coordination.

A few commenters requested eliminating the provision authorizing discharges when a DE does not notify the applicant within a specified time frame. We believe that the PCN process allows the district adequate time to evaluate PCNs and provide the applicant with an answer. Moreover, we believe that we must have a definitive answer to the applicant at the end of the 30-day (45 days for NWP 26) PCN period. Creating extensions would result in substantial confusion.

One commenter recommended that wording of condition 13(f) be changed to read ''* * * with the current methods required by the Memorandum of Agreement among USDA, EPA, and DOA.'' This commenter also stated that condition 13(g) mitigation, should specify that mitigation banks need to comply with the 1995 Federal

Guidance, should include a requirement to monitor compensatory mitigation projects for a specified period of time, abandoned mine lands should have no contaminants accumulated as a result of the mining operation, and compensatory mitigation should be accomplished prior to initiation of authorized work. We believe that compliance with existing conditions of the NWPs and the fact that requirements for delineations and mitigation banks are implicitly clear, based on total program guidance, make additional guidance on these issues unnecessary. Regarding timing of compensatory mitigation, we believe it is more important to have potentially high-quality mitigation, such as can be provided with in lieu fees to states, locals interests or land trusts, rather than pushing for mitigation completion before impacts occur.

One commenter requested that individuals impacted by a nationwide permit should be notified. We have followed the clear provisions of 33 CFR 330 regarding notification of the nationwide permits.

Several commenters requested that the Corps return to the 1991 wording regarding including any conditions the District Engineer *deems necessary* under Condition 13(d), and that, if the new language is retained, a clear explanation of why this change was made should be provided. We have reviewed the proposed language as well as the 1991 language regarding conditions that will be placed on a PCN verification. We have decided that the original language, stating that the District Engineer will include conditions he deems necessary, is the appropriate language. This condition is adopted as discussed above.

14. Compliance Certification: The Corps has determined that in association with our efforts to collect more accurate data on project impacts and mitigation, and consistent with our intent to maximize permittee compliance, this condition is necessary. The condition requires the permittee to certify, in writing, that he has accomplished the work as authorized by the Corps, including any mitigation. The certification will help the Corps ensure permit compliance as well as continuously evaluate mitigation success.

15. Multiple Use of Nationwide Permits: In response to the concerns raised regarding the stacking of NWPs, the Corps has determined that a notification to the Corps, where any NWP 12 through 40 is combined with any other NWP 12 through 40, as part of a single and complete project, should be required to ensure that the effects will be minimal. This notification will be reviewed by the Corps only. Coordination with the resource agencies is not required, but may be done on a case-by-case basis when determined by the District Engineer to be necessary. Furthermore, no notification is required to the Corps when any NWP 1 through 11 is combined with any other NWP. The issue of stacking of NWPs is discussed in more detail in the ''Stacking of NWPs'' section of this Preamble.

B. Section 404 Only Conditions

1. Water Supply Intakes: The Corps proposed no changes and there were no comments on this condition. The condition is adopted without change.

2. Shellfish Production: The Corps proposed no changes and there were no comments on this condition. The condition is adopted without change.

3. Suitable Material: The Corps proposed no changes to this condition. One commenter suggested that this condition should include a certification for the toxicity testing of the fill material. We believe the permittee is responsible for taking reasonable measures to ensure that suitable fill material is free from toxic pollutants. This suggestion would be an unreasonable requirement for minor projects with little likelihood of the potential for toxic pollutants in toxic amounts. Furthermore, the NWP restricts the use of certain materials. In addition, for those projects with a Preconstruction Notification, the DE will require testing if the DE has reason to believe the material may be contaminated. Another commenter suggested that asphalt be added to our list of unsuitable materials specifically mentioned in this condition. Since this has been a general misunderstanding throughout the country that has resulted in several violations, we agree with this commenter and have added this to the condition. This condition has been modified as discussed above.

4. Mitigation: The Corps proposed a change to this condition that would allow off-site mitigation in lieu of on-site mitigation, if it is the environmentally preferred option. Several commenters were opposed to the proposed change to this condition. They believed the change would result in one or more of the following: A more subjective evaluation would occur; the evaluation would focus solely on a project's benefit to the environment instead of the Corps process of balancing various public interest factors; the District Engineer would be required to evaluate one wetland type against another; and time requirements and monetary costs would be increased for the applicants. Several other commenters were concerned that the proposed modification sidesteps the application of the mitigation sequencing process (avoidance, minimization, and compensation) and would allow evaluation of compensation concurrent with avoidance and minimization. Two commenters believed that the proposed evaluation process would allow ''buy down'' of impacts via compensation in order to result in a minimal net effect determination. Several commenters felt that mitigation should be eliminated as a condition since activities requiring mitigation, by definition, include more than minimal environmental impacts. One commenter stated that the proposal added no value in protecting or preserving wetlands. A few commenters supported the clarification and requirement for mitigation. One commenter recommended that the District Engineer have the ability to approve mitigation on-site, off-site, or at an established mitigation bank. Another commenter suggested that the U.S. Fish and Wildlife Service and U.S. Environmental Protection Agency should have the opportunity to comment on the results of the District Engineer's evaluation. One commenter criticized the general permit program for allowing wetland losses without avoidance of impacts or with no mitigation at all.

This condition requires that the permittee avoid and minimize discharges of dredged or fill material at the project site to the maximum extent practicable. This condition does not address the issue of requiring compensatory mitigation to reduce a project's impacts to the minimal effect level. This issue is discussed in the preamble in the discussion of General Condition 13. Furthermore, the ''sequencing'' requirement for individual permits for off-site avoidance under the section 404(b)(1) Guidelines does not apply to general permits. (See 40 CFR 230.7.) The proposed change was for allowing some projects, with minimal adverse effects, to be allowed less on-site avoidance and minimization than to the maximum extent practicable, provided off-site mitigation is provided such that there are more environmental benefits. We believe that where there is more environmental benefit from such mitigation, it should be allowed. The District Engineer will review and consider such a proposal, but will only approve it if the District Engineer determines that there is clear environment benefit. This condition is adopted as proposed.

5. Spawning Areas: The Corps proposed no changes to this condition. One commenter suggested that we ban discharges in spawning areas during spawning season. Another commenter suggested that discharges also be avoided during the incubation season. In addition to this condition, District and Division Engineers can and do add local restrictions, by regionally conditioning the NWP, to address certain activities along some waters at important times of the year for spawning activities. We believe that since these impacts vary from waterbody to waterbody and by type of activity, that it is best handled by specific regional conditions. This condition is adopted without change.

6. Obstruction of High Flows: The Corps proposed no changes to this condition. There were no comments on this condition. This condition is adopted without change.

7. Adverse Effects From Impoundment: The Corps proposed no changes to this condition. A couple of commenters suggested modifying this condition to require avoidance of impoundment impacts. We believe that this condition has been successful in ensuring that the impacts will be minimal and at the lowest level practicable. This condition is adopted without change.

8. Waterfowl Breeding Areas: The Corps proposed no changes to this condition. One commenter suggested disallowing any discharges within waterfowl breeding areas. Another commenter suggested that we include breeding areas for shorebirds and neotropical migratory songbirds. The Corps believes this would place an unreasonable and overly restrictive limitation on this NWP, and that the condition, as worded, provides sufficient protection. This condition is adopted without change.

9. Removal of Temporary Fills: The Corps proposed no changes to this condition. A few commenters suggested requiring the disturbed area be revegetated with indigenous plant species. We believe the conditions imposed on NWPs allowing for temporary fills will enable the area to revegetate naturally with native species once the area is restored to its preexisting elevation. This condition is adopted without change.

Regional Conditioning of Nationwide Permits: Concurrent with this **Federal Register** notice, District Engineers are issuing local public notices. In addition to the changes to some NWPs and NWP conditions required by the Chief of Engineers, the Division and District Engineers may propose regional conditions or propose revocation of NWP authorization for all, some, or portions of the NWPs. Regional conditions may also be required by state Section 401 water quality certification or for state coastal zone consistency. District engineers will announce regional conditions or revocations by issuing local public notices. Information on regional conditions and revocation can be obtained from the appropriate District Engineer, as indicated below. Furthermore, this and additional information can be obtained on the internet at http://wetland.usace.mil/.

Alabama

Mobile District Engineer, ATTN: CESAM–OP–S, P.O. Box 2288, Mobile, AL 36628–0001

Alaska

Alaska District Engineer, ATTN: CENPA–CO–R, P.O. Box 898, Anchorage, AK 99506–0898

Arizona

Los Angeles District Engineer, ATTN: CESPL–CO–R, P.O. Box 2711, Los Angeles, CA 90053–2325

Arkansas

Little Rock District Engineer, ATTN: CESWL–CO–R, P.O. Box 867, Little Rock, AR 72203–0867

California

Sacramento District Engineer, ATTN: CESPK–CO–O, 1325 J Street, Sacramento, CA 95814–4794

Colorado

Albuquerque District Engineer, ATTN: CESWA–CO–R, 4101 Jefferson Plaza NE, Rm 313, Albuquerque, NM 87109–3435

Connecticut

New England Division Engineer, ATTN: CENED–OD–R, 424 Trapelo Road, Waltham, MA 02254–9149

Delaware

Philadelphia District Engineer, ATTN: CENAP–OP–R, Wannamaker Building, 100 Penn Square, East Philadelphia, PA 19107–3390

Florida

Jacksonville District Engineer, ATTN: CESAJ–RD, P.O. Box 4970, Jacksonville, FL 32232–0019

Georgia

Savannah District Engineer, ATTN: CESAS–OP–F, P.O. Box 889, Savannah, GA 31402–0889

Hawaii

Honolulu District Engineer, ATTN: CEPOD–ET–PO, Building 230, Fort Shafter, Honolulu, HI 96858–5440

Idaho

Walla Walla District Engineer, ATTN: CENPW–OP–RF, Building 602, City-County Airport, Walla Walla, WA 99362–9265

Illinois

Rock Island District Engineer, ATTN: CENCR–OD–S, P.O. Box 2004, Rock Island, IL 61201–2004

Indiana

Louisville District Engineer, ATTN: CEORL–OR–F, P.O. Box 59, Louisville, KY 40201–0059

Iowa

Rock Island District Engineer, ATTN: CENCR–OD–S, P.O. Box 2204, Rock Island, IL 61201–2004

Kansas

Kansas City District Engineer, ATTN: CEMRK–OD–P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106–2896

Kentucky

Louisville District Engineer, ATTN: CEORL–OR–F, P.O. Box 59, Louisville, KY 40201–0059

Louisiana

New Orleans District Engineer, ATTN: CELMN–OD–S, P.O. Box 60267, New Orleans, LA 70160–0267

Maine

New England Division Engineer, ATTN: CENED–OD–R, 424 Trapelo Road, Waltham, MA 02254–9149

Maryland

Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715

Massachusetts

New England Division Engineer, ATTN: CENED–OD–R, 424 Trapelo Road, Waltham, MA 02254–9149

Michigan

Detroit District Engineer, ATTN: CENCE–CO–L, P.O. Box 1027, Detroit, MI 48231–1027

Minnesota

St. Paul District Engineer, ATTN: CENCS–CO–R, 190 Fifth Street, East, St. Paul, MN 55101–1638

Mississippi

Vicksburg District Engineer, ATTN: CELMV–CO–0, P.O. Box 80, Vicksburg, MS 39180–0080

Missouri

Kansas City District Engineer, ATTN: CEMRK–OD–P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106–2896

Montana

Omaha District Engineer, ATTN: CEMRO–OP–R, P.O. Box 5, Omaha, NE 68101–0005

Nebraska

Omaha District Engineer, ATTN: CEMRO–OP–R, 215 North 17th Street, Omaha, NE 68101–4978

Nevada

Sacramento District Engineer, ATTN: CESPK–CO–O, 1325 J Street, Sacramento, CA 95814–2922

New Hampshire

New England Division Engineer, ATTN: CENED–OD–R, 424 Trapelo Road, Waltham, MA 02254–9149

New Jersey

Philadelphia District Engineer, ATTN: CENAP–OP–R, Wannamaker Building, 100 Penn Square East, Philadelphia, PA 19106–2991

New Mexico

Albuquerque District Engineer, ATTN: CESWA–CO–R, 4101 Jefferson Plaza NE, Rm 313, Albuquerque, NM 87109–3435

New York

New York District Engineer, ATTN: CENAN–OP–R, Jacob K. Javits Federal Building, New York, NY 10278–0090

North Carolina

Wilmington District Engineer, ATTN: CESAW–CO–R, P.O. Box 1890, Wilmington, NC 28402–1890

North Dakota

Omaha District Engineer, ATTN: CEMRO–OP–R, 215 North 17th Street, Omaha, NE 68102–4978

Ohio

Huntington District Engineer, ATTN: CEORH–OR–F, 502 8th Street, Huntington, WV 25701–2070

Oklahoma

Tulsa District Engineer, ATTN: CESWT–OD–R, P.O. Box 61, Tulsa, OK 74121–0061

Oregon

Portland District Engineer, ATTN: CENPP–PL–R, P.O. Box 2946, Portland, OR 97208–2946

Pennsylvania

Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715

Rhode Island

New England Division Engineer, ATTN: CENED–OD–R, 424 Trapelo Road, Waltham, MA 02254–9149

South Carolina

Charleston District Engineer, ATTN: CESAC–CO–P, P.O. Box 919, Charleston, SC 29402–0919

South Dakota

Omaha District Engineer, ATTN: CEMRO–OP–R, 215 North 17th Street, Omaha, NE 68102–4978

Tennessee

Nashville District Engineer, ATTN: CEORN–OR–F, P.O. Box 1070, Nashville, TN 37202–1070

Texas

Ft. Worth District Engineer, ATTN: CESWF–OD–R, P.O. Box 17300, Ft. Worth, TX 76102–0300

Utah

Sacramento District Engineer, ATTN: CESPK–CO–O, 1325 J Street, CA 95814–4794

Vermont

New England Division Engineer, ATTN: CENED–OD–R, 424 Trapelo Road, Waltham, MA 02254–9149

Virginia

Norfolk District Engineer, ATTN: CENAO–OP–P, 803 Front Street, Norfolk, VA 23510–1096

Washington

Seattle District Engineer, ATTN: CENPS–OP–RG, P.O. Box 3755, Seattle, WA 98124–2255

West Virginia

Huntington District Engineer, ATTN: CEORH–OR–F, 502 8th Street, Huntington, WV 25701–2070

Wisconsin

St. Paul District Engineer, ATTN: CENCS–CO–R, 190 Fifth Street, East, St. Paul, MN 55101–1638

Wyoming

Omaha District Engineer, ATTN: CEMRO–OP–R, 215 North 17th Street, NE 68102–4978

District of Columbia

Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715

Pacific Territories

Honolulu District Engineer, ATTN: CEPOD–ET–PO, Building 230, Fort Shafter, Honolulu, HI 96858–5440

Puerto Rico & Virgin Is

Jacksonville District Engineer, ATTN: CESAJ–RD, P.O. Box 4970, Jacksonville, FL 32232–0019

Approved:

Russell L. Fuhrman,

Major General, U.S. Army, Director of Civil Works.

Accordingly, these Nationwide Permits are issued as follows:

Nationwide Permits and Conditions

A. Index of the Nationwide Permits and Conditions

B. Nationwide Permits and Conditions

1. Aids to Navigation: The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard.

(See 33 CFR part 66, chapter I, subchapter C). (Section 10)

2. Structures in Artificial Canals: Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Section 10)

3. Maintenance: The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement are permitted, provided the environmental effects resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This NWP authorizes the repair, rehabilitation, or replacement of those structures destroyed by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced or under contract to commence within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays. Maintenance dredging and beach restoration are not authorized by this NWP. (Sections 10 and 404)

4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities: Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, clam and oyster digging; and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP authorizes shellfish seeding provided this activity does not occur in wetlands or sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist, but may not be present in a given year.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. (Sections 10 and 404)

5. Scientific Measurement Devices: Devices whose purpose is to measure and record scientific data such as staff gages, tide gages, water recording devices, water quality testing and improvement devices and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards and further for discharges of 10 to 25 cubic yards provided the permittee notifies the District Engineer in accordance with the ''Notification'' general condition. (Sections 10 and 404)

6. Survey Activities: Survey activities including core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, soil survey and sampling, and historic resources surveys. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration is not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads, pads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling muds and cuttings may require a permit under section 402 of the Clean Water Act. (Sections 10 and 404)

7. Outfall Structures. Activities related to construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or are otherwise in compliance with regulations issued under the National Pollutant discharge Elimination System program (Section 402 of the Clean Water Act), provided that the permittee notifies the District Engineer in accordance with the ''Notification'' general condition. (Also see 33 CFR 330.1(e)). Intake structures per se are not included—only those directly associated with an outfall structure. (Sections 10 and 404)

8. Oil and Gas Structures. Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Minerals Management Service. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). (Where such limits have not been designated, or where changes are anticipated, District Engineers will consider asserting discretionary authority in accordance with 33 CFR 330.4(e) and will also review such proposals to ensure they comply with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this permit will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f)). Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334: nor will such structures be permitted in EPA or Corps designated dredged material disposal areas. (Section 10)

9. Structures in Fleeting and Anchorage Areas. Structures, buoys, floats and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established for that purpose by the U.S. Coast Guard. (Section 10)

10. Mooring Buoys. Non-commercial, single-boat, mooring buoys. (Section 10)

11. Temporary Recreational Structures. Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 10)

12. Utility Line Discharges. Discharges of dredged or fill material associated with excavation, backfill or bedding for utility lines, including outfall and intake structures, provided there is no change in preconstruction contours. A ''utility line'' is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. The term ''utility line'' does not include activities which drain a water of the United States, such as drainage tile; however, it does apply to pipes conveying drainage from another area. This NWP authorizes mechanized landclearing necessary for the installation of utility lines, including overhead utility lines, provided the cleared area is kept to the minimum necessary and preconstruction contours

are maintained. However, access roads, temporary or permanent, or foundations associated with overhead utility lines are not authorized by this NWP. Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The DE may extend the period of temporary side-casting not to exceed a total of 180 days, where appropriate. The area of waters of the United States that is disturbed must be limited to the minimum necessary to construct the utility line. In wetlands, the top 6'' to 12'' of the trench should generally be backfilled with topsoil from the trench. Excess material must be removed to upland areas immediately upon completion of construction. Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line. (See 33 CFR part 322).

Notification: The permittee must notify the district engineer in accordance with the ''Notification'' general condition, if any of the following criteria are met:

(a) Mechanized landclearing in a forrested wetland;

(b) A Section 10 permit is required for the utility line;

(c) The utility line in waters of the United States exceeds 500 feet; or,

(d) The utility line is placed within a jurisdictional area (i.e., a water of the United States), and it runs parallel to a streambed that is within that jurisdictional area. (Sections 10 and 404)

13. Bank Stabilization. Bank stabilization activities necessary for erosion prevention provided the activity meets all of the following criteria:

a. No material is placed in excess of the minimum needed for erosion protection;

b. The bank stabilization activity is less than 500 feet in length;

c. The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line;

d. No material is placed in any special aquatic site, including wetlands;

e. No material is of the type, or is placed in any location, or in any manner, so as to impair surface water flow into or out of any wetland area;

f. No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and treetops may be used in low energy areas); and,

g. The activity is part of a single and complete project.

Bank stabilization activities in excess of 500 feet in length or greater than an average of one cubic yard per running foot may be authorized if the permittee notifies the District Engineer in accordance with the ''Notification'' general condition and the District Engineer determines the activity complies with the other terms and conditions of the NWP and the adverse environmental effects are minimal both individually and cumulatively. This NWP may not be used for the channelization of a water of the Unitied States. (Sections 10 and 404)

14. Road Crossings. Fills for roads crossing waters of the United States (including wetlands and other special aquatic sites) provided the activity meets all of the following criteria:

a. The width of the fill is limited to the minimum necessary for the actual crossing;

b. The fill placed in waters of the United States is limited to a filled area of no more than ⅓ acre. Furthermore, no more than a total of 200 linear feet of the fill for the roadway can occur in special aquatic sites, including wetlands;

c. The crossing is culverted, bridged or otherwise designed to prevent the restriction of, and to withstand, expected high flows and tidal flows, and to prevent the restriction of low flows and the movement of aquatic organisms;

d. The crossing, including all attendant features, both temporary and permanent, is part of a single and complete project for crossing of a water of the United States; and,

e. For fills in special aquatic sites, including wetlands, the permittee notifies the District Engineer in accordance with the ''Notification'' general condition. The notification must also include a delineation of affected special aquatic sites, including wetlands.

This NWP may not be combined with NWP 18 or NWP 26 for the purpose of increasing the footprint of the road crossing. Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4). Also, where local circumstances indicate the need, District Engineers will define the term ''expected high flows'' for the purpose of establishing applicability of this NWP. (Sections 10 and 404)

15. U.S. Coast Guard Approved Bridges. Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such discharges have been authorized by the U.S. Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this NWP and will require an individual or regional Section 404 permit. (Section 404)

16. Return Water From Upland Contained Disposal Areas. Return water from an upland, contained dredged material disposal area. The dredging itself may require a section 404 permit (33 CFR 323.2(d)), but will require a Section 10 permit if located in navigable waters of the United States. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d) even though the disposal itself occurs on the upland and thus does not require a Section 404 permit. This NWP satisfies the technical requirement for a Section 404 permit for the return water where the quality of the return water is controlled by the state through the Section 401 certification procedures. (Section 404)

17. Hydropower Projects: Discharges of dredged or fill material associated with (a) small hydropower projects at existing reservoirs where the project, which includes the fill, are licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; and has a total generating capacity of not more than 5000 KW; and the permittee notifies the District Engineer in accordance with the ''Notification'' general condition; or (b) hydropower projects for which the FERC has granted an exemption from licensing pursuant to section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and section 30 of the Federal Power Act, as amended; provided the permittee notifies the District Engineer in accordance with the ''Notification'' general condition. (Section 404)

18. Minor Discharges: Minor discharges of dredged or fill material into all waters of the United States provided that the activity meets all of the following criteria:

a. The quantity of discharged material and the volume of excavated area does not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

b. The discharge, including any excavated area, will not cause the loss of more than 1/10 acre of a special aquatic site, including wetlands. For the purposes of this NWP, the acreage limitation includes the filled area and excavated area plus special aquatic sites that are adversely affected by flooding and special aquatic sites that are

drained so that they would no longer be a water of the United States as a result of the project;

c. If the discharge, including any excavated area, exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line or if the discharge is in a special aquatic site, including wetlands, the permittee notifies the District Engineer in accordance with the ''Notification'' general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands (Also see 33 CFR 330.1(e)); and

d. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project and is not placed for the purpose of a stream diversion.

e. This NWP can not be used in conjunction with NWP 26 for any single and complete project. (Sections 10 and 404)

19. Minor Dredging: Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., section 10 waters) as part of a single and complete project. This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist, but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). (Sections 10 and 404)

20. Oil Spill Cleanup: Activities required for the containment and cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) provided that the work is done in accordance with the Spill Control and Countermeasure Plan required by 40 CFR part 112.3 and any existing State contingency plan and provided that the Regional Response Team (if one exists in the area) concurs with the proposed containment and cleanup action. (Sections 10 and 404)

21. Surface Coal Mining Activities: Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the ''Notification'' general condition. The notification must include an OSM or state approved mitigation plan. The Corps, at the discretion of the District Engineer, may require a bond to ensure success of the mitigation, if no other Federal or state agency has required one. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)) (Sections 10 and 404)

22. Removal of Vessels: Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This NWP does not authorize the removal of vessels listed or determined eligible for listing on the National Register of Historic Places unless the District Engineer is notified and indicates that there is compliance with the ''Historic Properties'' general condition. This NWP does not authorize maintenance dredging, shoal removal, or river bank snagging. Vessel disposal in waters of the United States may need a permit from EPA (see 40 CFR 229.3). (Sections 10 and 404)

23. Approved Categorical Exclusions: Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where that agency or department has determined, pursuant to the Council on Environmental Quality Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and the Office of the Chief of Engineers (ATTN: CECW–OR) has been furnished notice of the agency's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this NWP of any agency's categorical exclusions, the Chief of Engineers will solicit public comment. In addressing these comments, the Chief of Engineers may require certain conditions for authorization of an agency's categorical exclusions under this NWP. (Sections 10 and 404)

24. State Administered Section 404 Program. Any activity permitted by a state administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)–(l) is permitted pursuant to section 10 of the Rivers and Harbors Act of 1899. Those activities which do not involve a section 404 state permit are not included in this NWP, but certain structures will be exempted by section 154 of Pub. L. 94–587, 90 Stat. 2917 (33 U.S.C. 59l) (see 33 CFR 322.3(a)(2)). (Section 10)

25. Structural Discharges: Discharges of material such as concrete, sand, rock, etc. into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and walkways or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does *not* authorize filled structural members that would support buildings, homes, parking areas, storage areas and other such structures. Housepads or other building pads are also not included in this NWP. The structure itself may require a section 10 permit if located in navigable waters of the United States. (Section 404)

26. Headwaters and Isolated Waters Discharges: Discharges of dredged or fill material into headwaters and isolated waters provided that the activity meets all of the following criteria:

a. The discharge does not cause the loss of more than 3 acres of waters of the United States nor cause the loss of waters of the United States for a distance greater than 500 linear feet of the stream bed;

b. For discharges causing the loss of greater than ⅓ acre of waters of the United States, the permittee notifies the District Engineer in accordance with the ''Notification'' general condition;

c. For discharges causing a loss of ⅓ acre or less of waters of the United States the permittee must submit a report within 30 days of completion of the work, containing the information listed below;

d. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands (Also see 33 CFR 330.1(e)); and

e. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project. Note, this NWP will expire on February 11, 1999.

For the purposes of this NWP, the acreage of loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding,

excavation or drainage as a result of the project. The 3 acre and ⅓ acre limits of NWP 26 are absolute, and cannot be increased by any mitigation plan offered by the applicant or required by the District Engineer. Whenever any other NWP is used in conjunction with this NWP, the total acreage of impacts to waters of the United States of all NWPs combined, can not exceed 3 acres.

Subdivisions: For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to subsection (b) of this NWP is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed ⅓ acre. Any discharge in any real estate subdivision which would cause the aggregate total loss of waters of the United States in the subdivision to exceed 3 acres is not authorized by this NWP; unless the District Engineer exempts a particular subdivision or parcel by making a written determination that: (1) The individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to February 11, 1997, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate the property owner's investment-backed expectations, or (2) that the individual and cumulative adverse environmental effects would be minimal, high quality wetlands would not be adversely affected, and there would be an overall benefit to the aquatic environment. Once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 26. For purposes of NWP 26, the term ''real estate subdivision'' shall be interpreted to include circumstances where a landowner or developer divides a tract of land into smaller parcels for the purpose of selling, conveying, transferring, leasing, or developing said parcels. This would include the entire area of a residential, commercial or other real estate subdivision, including all parcels and parts thereof.

Report: For discharges causing the loss of ⅓ acre or less of waters of the United States the permittee must submit a report within 30 days of completion of the work, containing the following information:

(a) Name, address, and telephone number of the permittee;

(b) Location of the work;

(c) Description of the work; and,

(d) Type and acreage (or square feet) of the loss of waters of the United States (e.g., 1/10 acre of marsh and 50 Square feet of a stream.) (Section 404)

27. Wetland and Riparian Restoration and Creation Activities: Activities in waters of the United States associated with the restoration of former non-tidal wetlands and riparian areas, the enhancement of degraded wetlands and riparian areas, and creation of wetlands and riparian areas; (i) On non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland restoration or creation agreement between the landowner and the U.S. Fish and Wildlife Service or the Natural Resources Conservation Service (NRCS) or voluntary wetland restoration, enhancement, and creation actions documented by the NRCS pursuant to NRCS regulations; or (ii) on any Federal land; or (iii) on reclaimed surface coal mined lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining or the applicable state agency. (The future reversion does not apply to wetlands created, restored or enhanced as mitigation for the mining impacts, nor naturally due to hydrologic or topographic features, nor for a mitigation bank.); or (iv) on any public or private land, provided the permittee notifies the District Engineer in accordance with the ''Notification'' general condition.

Such activities include, but are not limited to: Installation and maintenance of small water control structures, dikes, and berms; backfilling of existing drainage ditches; removal of existing drainage structures; construction of small nesting islands; plowing or discing for seed bed preparation; and other related activities. This NWP applies to restoration projects that serve the purpose of restoring ''natural'' wetland hydrology, vegetation, and function to altered and degraded non-tidal wetlands and ''natural'' functions of riparian areas. This NWP does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed.

Reversion: For restoration, enhancement and creation projects conducted under paragraghs (ii) and (iv), this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit at that time would be required for any reversion. For restoration, enhancement and creation projects conducted under paragraghs (i) and (iii), this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or creation activities) within five years after expiration of a limited term wetland restoration or creation agreement or permit, even if the discharge occurs after this NWP expires. The five year reversion limit does not apply to agreements without time limits reached under paragraph (i). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Prior to any reversion activity the permittee or the appropriate Federal or state agency must notify the District Engineer and include the documentation of the prior condition. Once an area has reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. (Sections 10 and 404)

28. Modifications of Existing Marinas: Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips or dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP. (Section 10)

29. Single-Family Housing: Discharges of dredged or fill material into non-tidal waters of the United States, including non-tidal wetlands for the construction or expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) for an individual permittee provided that the activity meets all of the following criteria:

a. The discharge does not cause the loss of more than 1/2 acre of non-tidal waters of the United States, including non-tidal wetlands;

b. The permittee notifies the District Engineer in accordance with the ''Notification'' general condition;

c. The permittee has taken all practicable actions to minimize the on-site and off-site impacts of the discharge. For example, the location of the home may need to be adjusted on-site to avoid flooding of adjacent property owners;

d. The discharge is part of a single and complete project; furthermore, that for any subdivision created on or after November 22, 1991, the discharges authorized under this NWP may not exceed an aggregate total loss of waters of the United States of 1/2 acre for the entire subdivision;

e. An individual may use this NWP only for a single-family home for a personal residence;

f. This NWP may be used only once per parcel;

g. This NWP may not be used in conjunction with NWP 14, NWP 18, or NWP 26, for any parcel; and,

h. Sufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation.

For the purposes of this NWP, the acreage of loss of waters of the United States includes the filled area previously permitted, the proposed filled area, and any other waters of the United States that are adversely affected by flooding, excavation, or drainage as a result of the project. Whenever any other NWP is used in conjunction with this NWP, the total acreage of impacts to waters of the United States of all NWPs combined, can not exceed 1/2 acres. This NWP authorizes activities only by individuals; for this purpose, the term ''individual'' refers to a natural person and/or a married couple, but does not include a corporation, partnership, or similar entity. For the purposes of this NWP, a parcel of land is defined as ''the entire contiguous quantity of land in possession of, recorded as property of, or owned (in any form of ownership, including land owned as a partner, corporation, joint tenant, etc.) by the same individual (and/or that individual's spouse), and comprises not only the area of wetlands sought to be filled, but also all land contiguous to those wetlands, owned by the individual (and/or that individual's spouse) in any form of ownership''. (Sections 10 and 404)

30. Moist Soil Management for Wildlife: Discharges of dredged or fill material and maintenance activities that are associated with moist soil management for wildlife performed on non-tidal Federally-owned or managed and State-owned or managed property, for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to: The repair, maintenance or replacement of existing water control structures; the repair or maintenance of dikes; and plowing or discing to impede succession, prepare seed beds, or establish fire breaks. Sufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, etc. associated with the management areas. This NWP does not authorize converting wetlands to uplands, impoundments or other open water bodies. (Section 404)

31. Maintenance of Existing Flood Control Facilities: Discharges of dredged or fill material for the maintenance of existing flood control facilities, including debris basins, retention/detention basins, and channels that were (i) previously authorized by the Corps by individual permit, general permit, or by 33 CFR 330.3 and constructed or (ii) constructed by the Corps and transferred to a local sponsor for operation and maintenance. The maintenance is limited to that approved in a maintenance baseline determination made by the district engineer (DE). The prospective permittee will provide the DE with sufficient evidence for the DE to determine the approved and constructed baseline. Subsequent to the determination of the maintenance baseline and prior to any maintenance work, the permittee must notify the DE in accordance with the ''Notification'' general condition.

All dredged material must be placed in an upland site or a currently authorized disposal site in waters of the United States, and proper siltation controls must be used. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses. (Activities that involve only the cutting and removing of vegetation above the ground, e.g., mowing, rotary cutting, and chainsawing, where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material, does not require a Section 404 permit in accordance with 33 CFR 323.2(d)(2)(ii)). Only constructed channels within stretches of natural rivers that have been previously authorized as part of a flood control facility could be authorized for maintenance under this NWP.

Maintenance Baseline: Upon receipt of sufficient evidence, the DE will determine the maintenance baseline. The maintenance baseline is the existing flood control project that the DE has determined can be maintained under this NWP, subject to any case-specific conditions required by the DE. In determining the maintenance baseline, the DE will consider the following factors: The approved facility, the actual constructed facility, the Corps constructed project that was transferred, the maintenance history, if the facility has been functioning at a reduced capacity and for how long, present vs. original flood control needs, and if sensitive/unique functions and values may be adversely affected. Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. This NWP can not be used until the DE determines the maintenance baseline and the need for mitigation and any regional or activity-specific conditions. The maintenance baseline will only be determined once and will remain valid for any subsequent reissuance of this NWP. However, if the project is effectively abandoned or reduced due to lack of proper maintenance, a new determination of a maintenance baseline would be required before this NWP could be used for subsequent maintenance.

Mitigation: In determining the need for mitigation, the DE will consider the following factors: Any original mitigation required, the current environmental setting, and any adverse effects of the maintenance project that were not mitigated in the original construction. The DE will not delay needed maintenance for completion of any required mitigation, provided that the DE and the applicant establish a schedule for the identification, approval, development, construction and completion of such required mitigation. (Sections 10 and 404)

32. Completed Enforcement Actions: Any structure, work or discharge of dredged or fill material, remaining in place, or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of section 404 of the Clean Water Act (CWA) and/or section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of section 404 of the CWA, provided that:

a. The unauthorized activity affected no more than 5 acres of nontidal wetlands or 1 acre of tidal wetlands;

b. The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this nationwide permit; and

c. The District Engineer issues a verification letter authorizing the activity subject to the terms and conditions of this nationwide permit and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an

enforcement action brought by the United States under section 404 of the CWA and/or section 10 of the Rivers and Harbors Act of 1899.

For both (i) or (ii) above, compliance is a condition of the NWP itself. Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement or fails to complete the work by the specified completion date. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Prior to reaching any settlement agreement the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6 (d)(2) and (e). (Sections 10 and 404)

33. Temporary Construction, Access and Dewatering: Temporary structures, work and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites; provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard, or for other construction activities not subject to the Corps or U.S. Coast Guard regulations. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must be of materials, and placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if it is determined by the District Engineer that it will not cause more than minimal adverse effects on aquatic resources. Temporary fill must be entirely removed to upland areas, or dredged material returned to its original location, following completion of the construction activity, and the affected areas must be restored to the pre-project conditions. Cofferdams cannot be used to dewater wetlands or other aquatic areas so as to change their use. Structures left in place after cofferdams are removed require a section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322). The permittee must notify the District Engineer in accordance with the ''Notification'' general condition. The notification must also include a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources. The District Engineer will add special conditions, where necessary, to ensure that adverse environmental effects are minimal. Such conditions may include: Limiting the temporary work to the minimum necessary; requiring seasonal restrictions; modifying the restoration plan; and requiring alternative construction methods (e.g., construction mats in wetlands where practicable.). (Sections 10 and 404)

34. Cranberry Production Activities: Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations provided that the activity meets all of the following criteria:

a. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, does not exceed 10 acres of waters of the United States, including wetlands;

b. The permittee notifies the District Engineer in accordance with the ''Notification'' general condition. The notification must include a delineation of affected special aquatic sites, including wetlands; and,

c. The activity does not result in a net loss of wetland acreage.

This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid. (Section 404)

35. Maintenance Dredging of Existing Basins: Excavation and removal of accumulated sediment for maintenance of existing marina basins, access channels to marina basins or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less, provided the dredged material is disposed of at an upland site and proper siltation controls are used. (Section 10)

36. Boat Ramps: Activities required for the construction of boat ramps provided:

a. The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or placement of pre-cast concrete planks or slabs. (Unsuitable material that causes unacceptable chemical pollution or is structurally unstable is not authorized);

b. The boat ramp does not exceed 20 feet in width;

c. The base material is crushed stone, gravel or other suitable material;

d. The excavation is limited to the area necessary for site preparation and all excavated material is removed to the upland; and,

e. No material is placed in special aquatic sites, including wetlands.

Dredging to provide access to the boat ramp may be authorized by another NWP, regional general permit, or individual permit pursuant to section 10 if located in navigable waters of the United States. (Sections 10 and 404)

37. Emergency Watershed Protection and Rehabilitation: Work done by or funded by the Natural Resources Conservation Service qualifying as an ''exigency'' situation (requiring immediate action) under its Emergency Watershed Protection Program (7 CFR part 624) and work done or funded by the Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13) provided the District Engineer is notified in accordance with the ''Notification'' general condition. (Also see 33 CFR 330.1(e)). (Sections 10 and 404)

38. Cleanup of Hazardous and Toxic Waste: Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority provided the permittee notifies the District Engineer in accordance with the ''Notification'' general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste. Activities undertaken entirely on a CERCLA site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act. (Sections 10 and 404)

39. Reserved.

40. Farm Buildings: Discharges of dredged or fill material into jurisdictional wetlands (but not including prairie potholes, playa lakes, or vernal pools) that were in agricultural crop production prior to December 23, 1985, i.e., farmed wetlands, for foundations and building pads for farm buildings. The discharge will be limited to the minimum necessary but will in no case exceed 1 acre (see the ''Mitigation'' Section 404 only condition). The permittee must notify the District Engineer in accordance with the ''Notification'' general condition for any farm building within 500 linear feet of any flowing water. (Section 404)

C. Nationwide Permit Conditions

General Conditions

The following general conditions must be followed in order for any authorization by a NWP to be valid:

1. Navigation: No activity may cause more than a minimal adverse effect on navigation.

2. Proper Maintenance: Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

3. Erosion and Siltation Controls: Appropriate erosion and siltation controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date.

4. Aquatic Life Movements: No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water.

5. Equipment: Heavy equipment working in wetlands must be placed on mats, or other measures must be taken to minimize soil disturbance.

6. Regional and Case-by-Case Conditions: The activity must comply with any regional conditions which may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state or tribe in its section 401 water quality certification.

7. Wild and Scenic Rivers: No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system, while the river is in an official study status; unless the appropriate Federal agency, with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely effect the Wild and Scenic River designation, or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service.)

8. Tribal Rights: No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

9. Water Quality Certification: In certain states, an individual Section 401 water quality certification must be obtained or waived (see 33 CFR 330.4(c)).

10. Coastal Zone Management: In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (see Section 330.4(d)).

11. Endangered Species: (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or critical habitat might be affected or is in the vicinity of the project, and shall not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized.

(b) Authorization of an activity by a nationwide permit does not authorize the ''take'' of a threatened or endangered species as defined under the Federal Endangered Species Act. In the absence of separate authorization (e.g., an ESA section 10 Permit, a Biological Opinion with ''incidental take'' provisions, etc.) from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, both lethal and non-lethal ''takes'' of protected species are in violation of the Endangered Species Act. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. Fish and Wildlife Service and National Marine Fisheries Service or their world wide web pages at http://www.fws.gov/~r9endspp/endspp.html and http://kingfish.spp.mnfs.gov/tmcintyr/prot_res.html#ES and Recovery, respectively.

12. Historic Properties: No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR part 325, appendix C. The prospective permittee must notify the District Engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)).

13. Notification:

(a) Timing: Where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a Pre-Construction Notification (PCN) as early as possible and shall not begin the activity:

(1) Until notified by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the District or Division Engineer; or

(2) If notified by the District or Division Engineer that an individual permit is required; or

(3) Unless 30 days (or 45 days for NWP 26 only) have passed from the District Engineer's receipt of the notification and the prospective permittee has not received notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) Contents of Notification: The notification must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s) or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity; and

(4) *For NWPs 14, 18, 21, 26, 29, 34, and 38,* the PCN must also include a delineation of affected special aquatic sites, including wetlands (see paragraph 13(f));

(5) *For NWP 21—Surface Coal Mining Activities*, the PCN must include an OSM or state approved mitigation plan.

(6) *For NWP 29—Single-Family Housing*, the PCN must also include:

(i) Any past use of this NWP by the individual permittee and/or the permitee's spouse;

(ii) A statement that the single-family housing activity is for a personal residence of the permittee;

(iii) A description of the entire parcel, including its size, and a delineation of wetlands. For the purpose of this NWP, parcels of land measuring 0.5 acre or less will not require a formal on-site delineation. However, the applicant

shall provide an indication of where the wetlands are and the amount of wetlands that exists on the property. For parcels greater than 0.5 acre in size, a formal wetland delineation must be prepared in accordance with the current method required by the Corps. (See paragraph 13(f));

(iv) A written description of all land (including, if available, legal descriptions) owned by the prospective permittee and/or the prospective permittee's spouse, within a one mile radius of the parcel, in any form of ownership (including any land owned as a partner, corporation, joint tenant, co-tenant, or as a tenant-by-the-entirety) and any land on which a purchase and sale agreement or other contract for sale or purchase has been executed;

(7) *For NWP 31—Maintenance of Existing Flood Control Projects*, the prospective permittee must either notify the District Engineer with a Pre-Construction Notification (PCN) prior to each maintenance activity or submit a five year (or less) maintenance plan. In addition, the PCN must include all of the following:

(i) Sufficient baseline information so as to identify the approved channel depths and configurations and existing facilities. Minor deviations are authorized, provided that the approved flood control protection or drainage is not increased;

(ii) A delineation of any affected special aquatic sites, including wetlands; and,

(iii) Location of the dredged material disposal site.

(8) *For NWP 33—Temporary Construction, Access, and Dewatering,* the PCN must also include a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources.

(c) Form of Notification: The standard individual permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PCN and must include all of the information required in (b) (1)–(7) of General Condition 13. A letter may also be used.

(d) District Engineer's Decision: In reviewing the pre-construction notification for the proposed activity, the District Engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may, optionally, submit a proposed mitigation plan with the pre-construction notification to expedite the process and the District Engineer will consider any optional mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects are minimal, the District Engineer will notify the permittee and include any conditions the DE deems necessary.

Any mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee elects to submit a mitigation plan, the District Engineer will expeditiously review the proposed mitigation plan, but will not commence a second 30-day (or 45-day for NWP 26) notification procedure. If the net adverse effects of the project (with the mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant stating that the project can proceed under the terms and conditions of the nationwide permit.

If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submitting a mitigation proposal that would reduce the adverse effects to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions.

(e) Agency Coordination: The District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

(i) For NWP 14, 21, 26 (between 1 and 3 acres of impact) , 29, 33, 37, and 38. The District Engineer will, upon receipt of a notification, provide immediately, e.g., facsimile transmission, overnight mail or other expeditious manner, a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 5 calendar days from the date the material is transmitted to telephone or fax the District Engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 10 calendar days (16 calendar days for NWP 26 PCNs) before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(ii) Optional Agency Coordination. For NWPs 5, 7, 12, 13, 17, 18, 27, 31, and 34, where a Regional Administrator of EPA, a Regional Director of USFWS, or a Regional Director of NMFS has formally requested general notification from the District Engineer for the activities covered by any of these NWPs, the Corps will provide the requesting agency with notification on the particular NWPs. However, where the agencies have a record of not generally submitting substantive comments on activities covered by any of these NWPs, the Corps district may discontinue providing notification to those regional agency offices. The District Engineer will coordinate with the resources agencies to identify which activities involving a PCN that the agencies will provide substantive comments to the Corps. The District Engineer may also request comments from the agencies on a case by case basis when the District Engineer determines that such comments would assist the Corps in reaching a decision whether effects are more than minimal either individually or cumulatively.

(iii) Optional Agency Coordination, 401 Denial. For NWP 26 only, where the state has denied its 401 water quality certification for activities with less than 1 acre of wetland impact, the EPA regional administrator may request agency coordination of PCNs between ⅓ and 1 acre. The request may only include acreage limitations within the ⅓ to 1 acre range for which the state has denied water quality certification. In cases where the EPA has requested coordination of projects as described here, the Corps will forward the PCN to EPA only. The PCN will then be forwarded to the Fish and Wildlife Service and the National Marine Fisheries Service by EPA under agreements among those agencies. Any agency receiving the PCN will be bound

by the EPA timeframes for providing comments to the Corps.

(f) Wetlands Delineations: Wetland delineations must be prepared in accordance with the current method required by the Corps. For NWP 29 see paragraph (b)(6)(iii) for parcels less than 0.5 acres in size. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 30-day period (45 days for NWP 26) will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

(g) Mitigation: Factors that the District Engineer will consider when determining the acceptability of appropriate and practicable mitigation include, but are not limited to:

(i) To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes;

(ii) To the extent appropriate, permittees should consider mitigation banking and other forms of mitigation including contributions to wetland trust funds, ''in lieu fees'' to organizations such as The Nature Conservancy, state or county natural resource management agencies, where such fees contribute to the restoration, creation, replacement, enhancement, or preservation of wetlands. Furthermore, examples of mitigation that may be appropriate and practicable include but are not limited to: Reducing the size of the project; establishing wetland or upland buffer zones to protect aquatic resource values; and replacing the loss of aquatic resource values by creating, restoring, and enhancing similar functions and values. In addition, mitigation must address wetland impacts, such as functions and values, and cannot be simply used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the NWPs (e.g., for NWP 26, 5 acres of wetlands cannot be created to change a 6-acre loss of wetlands to a 1 acre loss; however, 2 created acres can be used to reduce the impacts of a 3-acre loss.).

14. Compliance Certification: Every permittee who has received a Nationwide permit verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter and will include: a. A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions; b. A statement that any required mitigation was completed in accordance with the permit conditions; c. The signature of the permittee certifying the completion of the work and mitigation.

15. Multiple Use of Nationwide Permits: In any case where any NWP number 12 through 40 is combined with any other NWP number 12 through 40, as part of a single and complete project, the permittee must notify the District Engineer in accordance with paragraphs a, b, and c on the ''Notification'' General Condition number 13. Any NWP number 1 through 11 may be combined with any other NWP without notification to the Corps, unless notification is otherwise required by the terms of the NWPs. As provided at 33 CFR 330.6(c) two or more different NWPs can be combined to authorize a single and complete project. However, the same NWP cannot be used more than once for a single and complete project.

Section 404 Only Conditions

In addition to the General Conditions, the following conditions apply only to activities that involve the discharge of dredged or fill material into waters of the U.S., and must be followed in order for authorization by the NWPs to be valid:

1. Water Supply Intakes: No discharge of dredged or fill material may occur in the proximity of a public water supply intake except where the discharge is for repair of the public water supply intake structures or adjacent bank stabilization.

2. Shellfish Production: No discharge of dredged or fill material may occur in areas of concentrated shellfish production, unless the discharge is directly related to a shellfish harvesting activity authorized by NWP 4.

3. Suitable Material: No discharge of dredged or fill material may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.,) and material discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

4. Mitigation: Discharges of dredged or fill material into waters of the United States must be minimized or avoided to the maximum extent practicable at the project site (i.e., on-site), unless the District Engineer approves a compensation plan that the District Engineer determines is more beneficial to the environment than on-site minimization or avoidance measures.

5. Spawning Areas: Discharges in spawning areas during spawning seasons must be avoided to the maximum extent practicable.

6. Obstruction of High Flows: To the maximum extent practicable, discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).

7. Adverse Effects From Impoundments: If the discharge creates an impoundment of water, adverse effects on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.

8. Waterfowl Breeding Areas: Discharges into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

9. Removal of Temporary Fills: Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

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Federal Register

Thursday,
March 9, 2000

Part III

Department of Defense

Department of the Army, Corps of Engineers

Final Notice of Issuance and Modification of Nationwide Permits; Notice

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Final Notice of Issuance and Modification of Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final notice.

SUMMARY: The Corps of Engineers (Corps) is issuing 5 new Nationwide Permits (NWPs) and modifying 6 existing NWPs to replace NWP 26 which expires on June 5, 2000. The Corps is also modifying nine NWP general conditions and adding two new NWP general conditions. The new NWP general conditions will increase protection of designated critical resource waters and waters of the United States within 100-year floodplains. In December 1996, the Corps decided to replace NWP 26, which authorizes discharges of dredged or fill material into headwaters and isolated waters of the United States, with activity-specific NWPs. The new and modified NWPs authorize many of the same activities that NWP 26 authorized, but the new and modified NWPs are activity-specific, with terms and conditions to ensure that these activities result in minimal adverse effects on the aquatic environment. The new and modified NWPs will substantially increase protection of the aquatic environment, while efficiently authorizing activities with minimal adverse effects on the aquatic environment. The maximum acreage limits of most of the new and modified NWPs is ½ acre. Most of the new and modified NWPs require notification to the district engineer for activities that result in the loss of greater than ⅒ acre of waters of the United States. This notice also constitutes the Corps application to States, Tribes, and the Environmental Protection Agency (EPA) for Section 401 water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency determinations. These agencies have 90 days to determine if the new and modified NWPs meet state or Tribal water quality standards and are consistent with state coastal zone management plans.

DATES: The new and modified NWPs and general conditions will become effective on June 5, 2000. The expiration date for NWP 26 is June 5, 2000.

ADDRESSES: HQUSACE, ATTN: CECW–OR, 20 Massachusetts Avenue, NW, Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson or Mr. Sam Collinson at (202) 761–0199 or access the Corps of Engineers Regulatory Home Page at: http://www.usace.army.mil/inet/functions/cw/cecwo/reg/.

SUPPLEMENTARY INFORMATION:

Background

In the December 13, 1996, issue of the **Federal Register** (61 FR 65874) the Corps reissued NWP 26 for a period of two years and announced its intention to replace NWP 26 with activity-specific NWPs. NWP 26 authorizes discharges of dredged or fill material into headwaters and isolated waters, provided the discharge does not result in the loss of greater than 3 acres of waters of the United States or 500 linear feet of stream bed. Headwaters are non-tidal streams, lakes, and impoundments that are part of a surface tributary system to interstate or navigable waters of the United States with an average annual flow of less than 5 cubic feet per second. Isolated waters are non-tidal waters of the United States that are not part of a surface tributary system to interstate or navigable waters and are not adjacent to such surface tributary systems to interstate or navigable waters.

In the July 1, 1998, issue of the **Federal Register** (63 FR 36040) the Corps published its initial proposal to replace NWP 26, including 6 new NWPs, modifying 6 existing NWPs, modifying 6 NWP general conditions, and adding one new NWP general condition. In the October 14, 1998, issue of the **Federal Register** (63 FR 55095), the Corps published a supplementary proposal to limit the use of the proposed new and modified NWPs in 100-year floodplains, impaired waters, and designated critical resource waters. In the October 14, 1998, **Federal Register** notice, the Corps also announced the withdrawal of the proposed NWP for master planned development activities and the extension of the expiration date of NWP 26 to September 15, 1999. The Corps also announced, in the October 14, 1998, **Federal Register** notice, its intent to solicit additional comments on the proposed new and modified NWPs and regional conditions proposed by Corps districts.

As a result of the comments received in response to the July 1, 1998, and October 14, 1998, **Federal Register** notices, the Corps made changes to the proposed NWPs and general conditions. The Corps also modified and reproposed the three new NWP general conditions to limit the use of NWPs in 100-year floodplains, impaired waters, and designated critical resource waters. The draft NWPs and general conditions were published in the July 21, 1999, issue of the **Federal Register** (64 FR 39252) for a 45-day comment period. Concurrent with this **Federal Register** notice, Corps districts proposed the latest drafts of their proposed regional conditions for the new and modified NWPs. In the September 3, 1999, issue of the **Federal Register** (64 FR 48386), the Corps announced that the comment period for the draft NWPs and general conditions was extended an additional 30 days to provide a 75-day comment period. The comment period for the July 21, 1999, **Federal Register** notice ended on October 7, 1999. In the September 3, 1999, **Federal Register** notice, the Corps also announced that the expiration date of NWP 26 was extended to January 5, 2000.

As a result of the number of substantial comments received in response to the July 21, 1999, **Federal Register** notice and the need for additional time to review those comments and develop the final NWPs and general conditions, the Corps issued another **Federal Register** notice on December 15, 1999 (64 FR 69994). This **Federal Register** notice announced a revised expiration date for NWP 26 and the process for accepting NWP 26 PCNs. The expiration date for NWP 26 was extended to April 14, 2000.

Since the schedule published in the December 15, 1999, **Federal Register** notice has changed, we are extending the expiration date of NWP 26 to June 5, 2000. NWP 26 PCNs submitted on or before March 9, 2000, (whether required or not) will be reviewed under the existing terms and conditions of NWPs. If those activities are authorized by NWP 26, their authorizations will be valid until February 11, 2002. If the activity is under construction or under contract prior to February 11, 2002, the permittee will have 12 additional months to complete the authorized activity. NWP 26 PCNs for activities that require notification which are submitted after March 9, 2000, will be reviewed under the new and modified NWPs or other types of DA authorization, such as individual permits. NWP 26 activities that do not require a PCN are authorized by NWP 26 until June 5, 2000. For those NWP 26 activities that do not require notification, the permittee has 12 months to complete the work if construction begins or is under contract before June 5, 2000.

The terms and limits of the new and modified NWPs are intended to authorize activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. Most of the new NWPs authorize activities in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. The

acreage limit for most of the new and modified NWPs is ½ acre. For the new and modified NWPs, the Corps has established pre-construction notification (PCN) thresholds to ensure that any activity that potentially may have more than minimal adverse effects on the aquatic environment is reviewed by a district engineer on a case-by-case basis. Most of the new NWPs require submission of a PCN for discharges of dredged or fill material resulting in the loss of greater than 1/10 acre of waters of the United States. Regional conditions may be added to the NWPs by division engineers to lower notification thresholds.

The new and modified NWPs issued today will become effective on June 5, 2000. This **Federal Register** notice begins the 90-day Clean Water Act Section 401 water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency determination processes. Because of the changes to the proposed new and modified NWPs, including the general conditions, we have increased the normal 60-day WQC and CZMA consistency determination processes to 90 days. During this 90-day period, Corps divisions and districts will finalize their regional conditions for the new and modified NWPs.

Discussion of Public Comments

I. Overview

In response to the July 21, 1999, **Federal Register** notice, we received over 1,700 comments. We reviewed and fully considered all of these comments. Most of the commenters expressed opposition to the proposed NWPs, but a few commenters indicated support for these NWPs. One commenter stated that NWP 26 should be retained without any changes. A number of commenters support the current NWP program, because data collected by the Corps during Fiscal Year (FY) 1997 indicates that there are net gains in aquatic resources because of the Corps mitigation requirements. These commenters indicated that this net gain demonstrates that the current NWP program results only in minimal adverse effects on the aquatic environment.

After considering the comments received in response to the July 21, 1999, **Federal Register** notice, we have made several important changes to the new and modified NWPs. For most of these NWPs, we have established a ½ acre limit. Notification to the district engineer will be required for most activities that result in the loss of greater than 1/10 acre of waters of the United States. For NWPs 39, 40, 42, and 43, we have imposed a 300 linear foot limit for filling and excavating stream beds. We have also increased the notification review period to 45 days. We have revised nine general conditions and added two new general conditions. The new NWP general conditions limit activities in designated critical resource waters and fills in waters of the United States within 100-year floodplains. All above-grade fill under NWPs 29, 39, 40, 42, 43, and 44 is prohibited within the FEMA-mapped 100-year floodplain below the headwaters of any stream. Within the headwaters, above-grade fill is prohibited within the FEMA-mapped regulatory floodway, and any above-grade fill in the flood fringe must meet FEMA standards.

These new restrictions on use of the NWPs will substantially increase the protection of the Nation's aquatic environment. These revised NWPs continue a trend by the Corps of Engineers of enhancing the protection of the aquatic environment through the NWP program. In 1977 the predecessor to NWP 26 authorized unlimited fill in headwaters and isolated waters without any notification of the Corps. In 1984 the Corps established a maximum project specific impact limit of 10 acres and a notification of the Corps for any impact greater than 1 acre. In 1996, we reduced these project specific limits to 3 acres maximum and 1/3 acre for notification of the Corps. To further ensure that the NWP program properly protects the aquatic environment, the Corps is conducting a Programmatic Environmental Impact Statement, which will be completed in early 2001. To ensure full protection of endangered species, the Corps is formally consulting with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service on the NWP program.

All of these substantial improvements will increase costs to applicants to some degree and will increase the funding needed by the Corps to maintain our current level of service to the public. Based on a report prepared by the Corps Institute for Water Resources (IWR) in response to the Corps FY 2000 Appropriations Act, the changes to the NWP program announced today will increase direct costs for permit applicants by about $20 million per year. Further, based on the IWR report, the Corps would need about $6 million in additional funding to maintain current levels of service to the public. We believe the changes are necessary to ensure the statutory requirement that general permits, including NWPs, will have no more than minimal adverse effects on the aquatic environment.

II. General Comments

In the following discussion, where the comments and responses were the same as for the July 21, 1999, **Federal Register** notice, we referred to the July 21, 1999, **Federal Register** notice instead of repeating those responses.

Many commenters objected to the proposed NWPs for the following reasons: (1) The proposed NWPs are too complex; (2) the proposed NWPs are contrary to the Congressional intent of Section 404(e) of the Clean Water Act; (3) the proposed NWPs are contrary to the Administration's 1993 Wetlands Plan, which states that Federal regulatory programs should be fair, flexible, and effective; (4) the proposed NWPs are contrary to the 1998 Clean Water Action Plan, which states that duplication between Federal, state, and local agencies and Tribal governments should be reduced wherever possible; (5) the conditions of these NWPs will cause many activities with minimal adverse effects on the aquatic environment to be processed as individual permits; and (6) these NWPs will result in unnecessary and costly burdens on the regulated public, increase delays, and increase the Corps workload without providing any benefits.

We have reduced the complexity of these NWPs as much as possible by making the scope of applicable waters for most of the new NWPs the same and establishing similar PCN thresholds. In addition, we have eliminated the indexed acreage limits from NWPs 39 and 40 and established a ½ acre limit for these NWPs. However, some complexity is unavoidable because different activities in waters of the United States do not have the same effects on the aquatic environment and each NWP must have different conditions to address those dissimilar impacts. The new and modified NWPs are conditioned to ensure that only those activities that have minimal adverse effects on the aquatic environment are authorized by these permits.

The new and modified NWPs are not contrary to Section 404(e) of the Clean Water Act, because each NWP authorizes activities that are similar in nature, with terms and conditions to ensure that those NWPs authorize only activities with minimal adverse effects on the aquatic environment. These NWPs still provide an expedited authorization process when compared to the standard permit process, because the district engineer must respond to the applicant within 45 days of the receipt date for a complete preconstruction

notification (PCN). The 45-day PCN review period is shorter than the average evaluation time for individual permits, which was 100 days in FY 1999.

The new and modified NWPs comply with the President's 1993 Wetlands Plan, by allowing the Corps regulatory program to continue to provide effective protection of wetlands and other aquatic resources and avoid unnecessary impacts to private property, the regulated public, and the aquatic environment. The new and modified NWPs, including the new and modified general conditions, will more clearly address individual and cumulative adverse effects on the aquatic environment and ensure that those adverse effects are minimal. The new and modified NWPs address specific applicant group needs and provide more predictability and consistency to the regulated public. During the development of these NWPs, we recognized the concerns of the natural resource agencies and environmental interest groups for potential adverse effects on the aquatic environment resulting from activities authorized by these NWPs and the regulated public's need for certainty and flexibility in the NWP program.

Although certain aspects of the new and modified NWPs duplicate existing Federal, state, and local agency programs, such duplication is not contrary to the 1998 Clean Water Action Plan because it provides additional protection for the aquatic environment. While some state and local governments may address some of the same issues that are addressed by the NWPs and general conditions, there are many areas of the country where those issues are not addressed. Therefore, we believe it is necessary to add certain conditions to the NWPs to address potential adverse effects to the aquatic environment. For example, General Condition 9 requires a water quality management plan for certain NWP activities, unless the state or Tribal Section 401 agency requires an adequate water quality management plan. If the state or Tribe does not adequately address impacts to water quality through its water quality certification process, the district engineer can require additional measures such as stormwater management facilities and vegetated buffers to protect water quality. There are circumstances where the Corps needs to consider more stringent NWP requirements to ensure that the adverse effects to the aquatic environment are minimal, individually and cumulatively.

We agree that the terms and conditions of the new and modified NWPs may cause some activities with minimal adverse effects on the aquatic environment to be subject to the individual permit process. It is important to note that aquatic resource functions and values differ greatly across the country. When developing NWPs that have national applicability, there will be many parts of the country where the terms and limits of the NWPs will not authorize some activities that have minimal adverse effects on the aquatic environment. In these areas, district engineers can issue regional general permits in the future to provide expedited authorization for categories of activities with minimal adverse effects on the aquatic environment.

However, for six months after the publication date of the new and modified NWPs, district engineers will not issue regional general permits or letters of permission (LOPs) that explicitly authorize the same activities as the new and modified NWPs. This six month period will allow Corps districts to assess how effectively the new and modified NWPs authorize activities with minimal adverse effects on the aquatic environment, individually and cumulatively.

As required by the Energy and Water Development Appropriations Act, 2000, we have conducted a study of the workload and compliance costs of the NWPs, including the new general conditions, proposed in the July 21, 1999, **Federal Register** notice. The report for this study was finalized in January 2000. This report is available on the Internet at the Corps headquarters regulatory home page.

The workload and compliance costs study determined that the proposal published in the July 21, 1999, **Federal Register** would increase the number of standard individual permit applications received by the Corps by 4,429 per year. This and other workload increases would result in direct compliance costs incurred by the regulated public by an estimated $46 million annually. The study also examined indirect compliance costs (i.e., opportunity costs) of the July 21, 1999, proposal. The indirect compliance costs include the opportunity costs that result from increases in permit processing times and an estimate of foregone development value caused by the vegetated buffer requirement. The study estimates that the processing times for standard permits would steadily increase each year if the July 21, 1999, proposal were to be implemented and Corps budget resources are not increased. Within five years, the average standard permit processing time and number of backlogged permit applications would increase three to four times the levels measured in FY 1998.

The study also examined an alternative replacement NWP package that included lowering the acreage limit of the new and modified NWPs to ½ acre and withdrawing the three proposed new NWP general conditions. The alternative replacement NWP package would result in 40% fewer standard permit applications and 30% less direct compliance costs than the July 21, 1999, proposal would. After five years, the standard permit processing times and permit application backlog would be approximately ½ of that estimated for the proposal published in the July 21, 1999, **Federal Register**.

Many commenters objected to the Corps statement in the July 21, 1999, **Federal Register** notice that NWPs are optional permits, and that if they do not want to comply with the terms and conditions of the NWPs, then they can request an individual permit. Numerous commenters indicated that the new and modified NWPs are likely to result in decreased protection of the aquatic environment because of the higher numbers of individual permits and a greater workload for the Corps that would result if these NWPs were implemented as proposed. Some commenters also stated that the new and modified NWPs would also result in less protection of the aquatic environment because project proponents would have less incentive to build projects with smaller impacts to aquatic resources due to the strict acreage limits, notification requirements, and conditions. In contrast, one commenter said that developers will modify their projects to comply with the new and modified NWPs. Another commenter said that the costs to the Corps and regulated public that are imposed by the new and modified NWPs will be offset by the additional environmental protection provided by those NWPs.

NWPs provide an expedited Corps permit process for activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. The NWPs are conditioned to ensure that only activities with minimal adverse effects are authorized. If a prospective permittee cannot comply with all of the terms and conditions of the NWPs, then he or she can request another form of Department of the Army (DA) authorization, such as a regional general permit or a standard individual permit.

We believe that the terms and conditions of the new and modified NWPs, including the ½ acre limit and 1/10 acre PCN threshold, are substantially more protective of the aquatic environment. The terms and conditions of these NWPs will ensure that only activities with minimal adverse effects on the aquatic environment are authorized by NWPs. Many project proponents will design their projects to comply with the ½ acre limit so that they can qualify for an NWP and receive authorization more quickly than they could through the standard permit process.

Many commenters stated that the new and modified NWPs would cause more than minimal adverse effects on the aquatic environment, individually and cumulatively. A few commenters said that the proposed NWPs do not comply with the requirement that general permits authorize only activities that are similar in nature. A number of commenters objected to the NWPs, because they provide no opportunity for the public to comment on individual projects.

We have developed terms and conditions for the new and modified NWPs to ensure that they authorize only those activities that result in minimal individual or cumulative adverse effects on the aquatic environment. The new and modified NWPs have PCN thresholds that require prospective permittees to notify district engineers prior to conducting activities that could result in more than minimal adverse effects. Most of the new and modified NWPs require notification to district engineers for discharges resulting in the loss of greater than 1/10 acre of waters of the United States. Division engineers can regionally condition these NWPs to lower notification thresholds, protect high value waters, or add additional restrictions to ensure that authorized activities result only in minimal adverse effects. District engineers will review PCNs on a case-by-case basis to determine if the adverse effects of the proposed work are minimal. If the adverse effects of a particular activity are more than minimal, the district engineer can either add conditions to the NWP authorization to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the proposed work.

Each of the new and modified NWPs authorizes activities that are similar in nature, in full compliance with section 404(e) of the Clean Water Act. This issue was discussed in detail in the July 21, 1999, **Federal Register** notice (64 FR 39263), and we have not changed our position on this matter.

The intent of general permits, including NWPs, is to efficiently authorize activities that have minimal adverse effects on the aquatic environment. These activities are usually non-controversial, and would generate few or no comments from the public if they were subject to the standard permit process. Conducting full public interest reviews for activities with minimal adverse effects on the aquatic environment would substantially increase the Corps workload with little or no added value for the aquatic environment.

A large number of commenters objected to the proposed NWPs, stating that the new and modified NWPs would result in significant wetland losses. Many commenters said that the new and modified NWPs would undermine the Administration's goal of net gain in wetland acreage stated in the Clean Water Action Plan.

The new and modified NWPs will not result in significant losses of wetlands because they are conditioned to require prospective permittees to avoid and minimize impacts to waters of the United States on-site to the maximum extent practicable (see General Condition 19). In addition, the ½ acre limit will substantially reduce wetland losses. Compensatory mitigation is often required for activities that require notification to the district engineer, which offset losses of wetlands and other aquatic habitats so that significant losses of wetlands do not occur as a result of the NWP program.

As discussed in the July 21, 1999, **Federal Register** notice, the NWP program supports the Administration's goal of no net loss and is not contrary to the goals of the Clean Water Action Plan.

Several commenters objected to the proposed NWPs, stating that the NWPs place too much reliance on the assertion of discretionary authority by district engineers. They said that this process does not provide adequate protection of the aquatic environment. Another commenter stated that the proposed NWPs are inappropriately based on the intent of the prospective permittee, instead of potential impacts to aquatic resources. One commenter indicated that there is too much overlap between the new and modified NWPs, which would be confusing to permit applicants.

We disagree with these commenters, because the notification process allows case-by-case review of those activities that have the potential for more than minimal adverse effects on the aquatic environment. If the adverse effects of the proposed activity are more than minimal, then the district engineer can either add special conditions to the NWP authorization to ensure that the activity results in minimal adverse effects or exercise discretionary authority and require an individual permit. This process provides substantial protection for the aquatic environment.

The new and modified NWPs are activity-specific to satisfy the requirements of section 404(e) of the Clean Water Act. These NWPs address impacts to the aquatic environment, because they are limited to certain types of waters and are conditioned to ensure that the adverse effects resulting from the authorized work are minimal, individually and cumulatively. Since these NWPs are activity-specific, they have to reflect specific categories of work that are conducted by individuals of certain occupations.

Although there is some overlap between the activities authorized by the new and modified NWPs, such redundancy is necessary because our intent was to develop NWPs that authorize single and complete projects generally without having to resort to using multiple NWPs. For instance, NWP 39 authorizes most features of residential, commercial, or institutional developments, including road crossings and stormwater management facilities.

Several commenters stated that the NWPs should only authorize activities that are water dependent. One of these commenters said that limiting the NWPs only to water dependent activities would result in a regulatory program that is easier to administer and result in wetland gains. Some commenters indicated that the proposed NWPs do not comply with the Section 404(b)(1) guidelines.

We addressed the issue of water dependency in the preamble of the July 21, 1999, **Federal Register** notice and have not changed our position on this issue. The new and modified NWPs comply fully with the requirements for general permits in the Section 404(b)(1) guidelines (see 40 CFR 230.7).

A few commenters opposed the new and modified NWPs because they said that the Corps has failed to define the term ''minimal effects'' in an understandable or meaningful way. Many commenters stated that the minimal adverse effects criterion for the NWPs is too subjective and that an assessment procedure that considers the size of impacts and quality of waters must be used instead.

The term ''minimal effect'' as it is used in the context of general permits,

including NWPs, cannot be simply defined. The terms and conditions of general permits are established so that those permits authorize most activities that result in minimal adverse effects on the aquatic environment. Preconstruction notifications are an important mechanism to ensure compliance with the minimal adverse effect requirement. Case-specific special conditions and regional general conditions are also important for addressing site-specific and regional concerns for the aquatic environment and ensuring that the NWPs authorize only activities with minimal adverse effects. For activities that require notification to the district engineer, the minimal adverse effects determination requires consideration of site-specific factors, such as the quality of waters that may be impacted by the proposed work, the functions and values of those waters, the geographic setting of the proposed work, and other factors. The minimal adverse effects criterion must be subjective, due to the complexity of the analysis required.

Two commenters suggested issuing the new NWPs with an expiration date of February 11, 2002, so that these NWPs will expire on the same day as the current NWPs. One commenter said that the new NWPs should be reevaluated when the current NWPs are reevaluated to determine if the use of all NWPs will result in more than minimal impacts. Two commenters recommended allowing NWP 26 to expire in January 2000 and not issuing the new NWPs until the next NWP reissuance in 2002. In the interim, individual permits would be required for activities that do not qualify for any of the current NWPs.

The new and modified NWPs issued today will expire on June 5, 2005 (i.e., five years from their effective date). However, when the current NWPs are proposed for reissuance in 2002, the new and modified NWPs are likely to be part of that proposal, so that all of the NWPs will be on the same five year cycle for review. We do not agree with the third comment of the previous paragraph. Allowing NWP 26 to expire prior to the effective date of the new and modified NWPs would be unfair to the regulated public.

Several commenters requested that the expiration date for NWP 26 should be extended to the expiration date of the current NWPs to ensure that NWP 26 is available until the effective date of the new and modified NWPs.

We do not agree that it is necessary to extend the expiration date of NWP 26 to February 11, 2002, because the new and modified NWPs will become effective on June 5, 2000. Keeping NWP 26 in place while the new and modified NWPs are effective would be contrary to the Corps goal of replacing NWP 26 with activity-specific NWPs.

One commenter suggested that the Corps clarify in this **Federal Register** notice that activities authorized by NWP 26 prior to the expiration date will continue to be authorized by NWP 26 for 12 months, provided the permittee has commenced construction or is under contract to commence construction. Another commenter recommended changing the 12-month grandfather provision for the NWPs to 24 months to provide adequate time for the completion of transportation projects.

A permittee who receives an NWP 26 authorization prior to the expiration date will have up to 12 months to complete the authorized activity, provided the permittee commences construction, or is under contract to commence construction, before the date NWP 26 expires (see 33 CFR 330.6(b)). Except as indicated below, this provision applies to all NWP authorizations unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the NWP authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5(c) or (d). We do not agree that it is necessary to increase the time period for the grandfathering provision from 12 months to 24 months. However, anyone who submitted a NWP 26 PCN on or before March 9, 2000, will have until February 11, 2003, to complete the work, provided the permittee receives an NWP 26 verification and has commenced construction or signed a construction contract prior to February 11, 2002.

Jurisdictional Issues

In response to the July 21, 1999, **Federal Register** notice, we received many comments concerning the scope of the Corps regulatory authority. These comments addressed excavation activities in waters of the United States and whether ephemeral streams, drainage ditches, and certain other categories of waterbodies are waters of the United States. Today's action addresses only NWPs, and in no way affects or alters the geographic or activities-based jurisdiction of the CWA nor is it intended to create new policy related to such jurisdiction.

Many commenters said that the Corps is ignoring recent court decisions by including excavation activities as regulated activities in the text of the new and modified NWPs. These commenters cited the recent decision by the United States Court of Appeals for the District of Columbia which upheld the United States District Court for the District of Columbia's decision in the *American Mining Congress* v. *Corps of Engineers* lawsuit. This lawsuit challenged the Corps and EPA's revised definition of ''discharge of dredged material'' that was promulgated on August 25, 1993 (58 FR 45008). The revised definition of ''discharge of dredged material'' was overturned because the District Court held that the rule was outside of the agencies' statutory authority and contrary to the intent of Congress by asserting Clean Water Act jurisdiction over activities where the only discharge associated with the activity is ''incidental fallback.'' These commenters requested that the Corps remove all references to excavation activities from the new and modified NWPs. Two commenters stated that the reference to excavation activities in the new and modified NWPs requires project proponents to submit a notification to the Corps to determine if a Corps permit is required. One commenter said that the final NWPs should contain guidance that explains when excavation is a regulated activity. This commenter also recommended that the Corps clarify how excavation activities are included in the calculation of acreage loss of waters of the United States, to determine if a particular activity exceeds PCN thresholds or NWP acreage limits.

The agencies revised their regulations on May 10, 1999, to respond to the results of the American Mining Congress lawsuit (64 FR 25120). It is important to recognize that not all excavation activities in waters of the United States are conducted so that only incidental fallback occurs. Excavation activities that result in the redeposit of dredged material into waters of the United States other than incidental fallback require a Section 404 permit. For example, excavated material may be temporarily stockpiled in waters of the United States before it is removed. Excavation activities that result only in discharges identified by the Corps as ''incidental fallback'' do not require a Section 404 permit. However, all excavation activities in Section 10 navigable waters require Corps permits under section 10 of the Rivers and Harbors Act of 1899. We have retained the excavation language in the new and modified NWPs and the definition of ''loss of waters of the United States'' because some excavation activities in Section 404 only waters of the United States result in discharges that still

require a Section 404 permit. These activities may be authorized by NWPs. NWPs issued under the Corps Section 10 authority also authorize excavation activities in navigable waters of the United States. No permit is required for excavation activities that do not meet the definition of discharge of dredged or fill material. As with any activity in waters of the United States, a landowner who is uncertain whether their activity needs a permit may contact the Corps.

Two commenters noted that a statement in the July 21, 1999, **Federal Register** notice (64 FR 39276) concerning excavation activities is inaccurate and misleading. This statement said that excavation activities that result in the replacement of an aquatic area with dry land or change the bottom elevation of a waterbody require a Section 404 permit. These commenters said that this statement is actually the definition of ''fill material'' and that excavation cannot, by itself, result in the replacement of an aquatic area with dry land or change the bottom elevation of a waterbody.

We agree that the statement in the **Federal Register** is inaccurate and have included clarification concerning when excavation activities require a Section 404 and/or a Section 10 permit from the Corps (see the above discussion). Excavation activities can change the bottom elevation of a waterbody by removing material and increasing the depth of the waterbody. Increasing the depth of a waterbody without associated discharges of dredged material other than incidental fallback does not require a Section 404 permit, but a Section 10 permit would be required if the activity is in Section 10 waters. However, an excavation activity that involves redeposit of dredged material into waters of the United States other than incidental fallback or involves the discharge of fill material that increases the bottom elevation of a waterbody or creates dry land requires a Section 404 permit (unless the activity qualifies for a Section 404(f) exemption).

A number of commenters stated that the Corps does not have authority to regulate discharges into ephemeral streams because these watercourses, by definition, contain water only briefly and therefore are not waters of the United States. One of these commenters noted that 33 CFR 328.3 includes intermittent streams, but does not include ephemeral streams. A few commenters remarked that the Corps has not explained how an ordinary water mark can be present in a watercourse that has water flow only during a short time after rain events. These commenters assert that under ordinary circumstances, ephemeral watercourses do not have flowing water and cannot develop an ordinary high water mark (OHWM). They said that the Corps needs to define what constitutes an ''ordinary flow'' in an ephemeral watercourse that establishes an OHWM and what indicators are to be used to determine the presence and location of the OHWM. In addition, these commenters stated that the Corps cannot use peak flows and flood stages in lieu of ordinary flows and the Corps cannot use cut banks, shelving, or debris that is influenced only by peak flows or flooding.

An ephemeral stream is a water of the United States, provided it has an OHWM. An ephemeral stream that does not have an OHWM is not a water of the United States. The frequency and duration at which water must be present to develop an OHWM has not been established for the Corps regulatory program. District engineers use their judgement on a case-by-case basis to determine whether an OHWM is present. The criteria used to identify an OHWM are listed in 33 CFR 328.3(e).

Several commenters said that the Corps can only exercise jurisdictional authority over those ephemeral waters that are tributaries to waters of United States. These commenters said that the low frequency of water flows in these watercourses requires the Corps to define criteria and circumstances to determine whether ephemeral watercourses are tributaries to waters of the United States. Some commenters also stated that the Corps has not demonstrated how ephemeral streams have any nexus to interstate commerce or how discharges of dredged or fill material into those watercourses would affect interstate commerce.

We agree that ephemeral streams that are tributary to other waters of the United States are also waters of the United States, as long as they possess an OHWM. The upstream limit of waters of the United States is the point where the OHWM is no longer perceptible (see 51 FR 41217). Ephemeral streams that are part of an interstate surface tributary system are waters of the United States, because they are an integral part of that surface tributary system, which supports interstate commerce.

Three commenters stated that the proposed NWPs illegally assert jurisdiction over drainage ditches. Three commenters objected to a statement in the July 21, 1999, **Federal Register** notice that drainage ditches constructed in waters of the United States remain waters of the United States. These commenters said that if a drainage ditch converts a water of United States to a non-jurisdictional upland, the drainage ditch would not be a water of United States unless the area remains a wetland or other type of water of United States. These commenters also objected to the Corps assertion that non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing water of the United States. They said that this position is contrary to preamble to November 13, 1986, final rule for the Corps regulatory program (51 FR 41217) and that this change requires justification. One commenter requested that the Corps clarify whether the entire ditch becomes jurisdictional if the OHWM becomes extended within the ditch or whether jurisdiction is extended only to that portion of the ditch that develops an OHWM. Two commenters asked for clarification whether a drainage ditch that runs through a series of uplands and waters of the United States is jurisdictional. One commenter asked how an OHWM that develops within a drainage ditch would be determined to be due to ordinary flows, not peak flows or flooding.

A drainage ditch constructed in a stream, wetland, or other water of the United States remains a water of the United States, provided an OHWM is still present. Since drainage ditches constructed in waters of the United States are constructed either by channelizing a stream or excavating the substrate to improve drainage, it is unlikely that the drainage ditches will become dry land unless the hydrology is removed by some other action. District engineers will determine, on a case-by-case basis, whether a particular area is a water of the United States. If the construction of a drainage ditch has legally converted the entire area to dry land, then the area drained is not a water of the United States, however, in most cases the drainage ditch would remain a water of the United States.

The statement that non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing water of the United States is consistent with the final rule published in the November 13, 1986, **Federal Register** and applies to ditches constructed in waters or that connect waters. Nothing in the NWP notice was intended to change the November 13, 1986, **Federal Register** notice which states that drainage ditches constructed entirely in upland areas generally are not considered to be waters of the United States.

Drainage ditches constructed in uplands that connect two waters of the United States may be considered waters of the United States if those ditches

constitute a surface water connection between those two waters of the United States. As previously noted, drainage ditches constructed entirely in uplands generally are not considered to be waters of the United States. District engineers will use the criteria at 33 CFR 328.3(e) to determine the presence and extent of an OHWM that may have developed in a drainage ditch.

One commenter stated that the July 21, 1999, **Federal Register** notice incorrectly asserts jurisdiction over farmed wetlands by considering them to be waters of the United States and the Corps does not have authority to require permits for discharges into these areas. Another commenter said that the Corps does not have the authority to regulate activities in isolated wetlands. Two commenters indicated that the Corps contradicts its regulations concerning the construction and maintenance of stormwater management facilities. These commenters assert that the Corps regulations published in the November 13, 1986, **Federal Register** state that detention and first flush basins are generally not considered waters of the United States. One commenter requested clear definitions of the terms ''waters of the United States,'' ''navigable waters,'' and ''navigable waters of the United States.''

Farmed wetlands as defined under the Food Security Act are waters of the United States provided they meet the criteria at 33 CFR 328.3. In addition, those criteria further provide that prior converted croplands are not waters of the United States. Isolated wetlands are waters of the United States, provided they meet the criteria at 33 CFR 328.3. (Within the Fourth Circuit, isolated waters must be shown to have an actual connection to interstate or foreign commerce.) Stormwater management facilities constructed in waters of the United States may, under certain circumstances, be considered waters of the United States. The Corps has the discretion to determine on a case-by-case basis whether or not a particular waterbody is a water of the United States (see 51 FR 41217). The term ''waters of the United States'' is defined at 33 CFR 328.3 and refers to the Corps Section 404 jurisdiction. The term ''navigable waters'' as used in Section 404 of the Clean Water Act has the same meaning as ''waters of the United States.'' The term ''navigable waters of the United States'' is defined at 33 CFR part 329 and refers to the Corps Section 10 jurisdiction. None of these definitions were changed by the proposed NWPs or these final NWPs.

Procedural Comments

Many commenters stated that the Corps was required to hold public hearings on the draft NWPs proposed in the July 21, 1999, **Federal Register** notice. Some of these commenters said that the draft NWPs, especially the three proposed new NWP general conditions, represent a substantial change from the proposed NWPs published in the July 1, 1998, **Federal Register** notice and that these changes warrant an additional public hearing. Numerous commenters stated that the 75-day comment period was inadequate to thoroughly review and comment on the July 21, 1999, **Federal Register** notice. Some of these commenters said that the comment period should be extended because many districts did not post their draft regional conditions on their Internet home pages quickly enough.

We believe that we have fully complied with the public hearing requirements of the Clean Water Act. After the publication of the July 1, 1998, **Federal Register** notice, public hearings on the proposed new and modified NWPs were held across the country, including a public hearing in Washington, DC on August 19, 1998. The proposal published in the July 21, 1999, **Federal Register** was a modification of the original July 1, 1998, proposal to replace NWP 26 with activity-specific NWPs.

The 75-day comment period for the July 21, 1999, **Federal Register** notice provided adequate time for the public to review and comment on the draft NWPs. Within one week of the publication of the July 21, 1999, **Federal Register** notice, 31 out of 38 districts had posted their draft regional conditions on their Internet home pages, which allowed the public sufficient time to consider how the regional conditioning process affected the proposed new and modified NWPs. All Corps districts had posted their draft regional conditions on their Internet home pages by September 3, 1999.

A large number of commenters said that the Corps has completely ignored the economic and workload implications of the new and modified NWPs and general conditions proposed in the July 21, 1999, **Federal Register** notice. These commenters indicated that the economic impacts of this proposal would be substantial. Many commenters stated that the new and modified NWPs should not be issued or implemented until an economic and workload analysis study is completed.

As required by the Energy and Water Development Appropriations Act, 2000, we have prepared, through the Institute for Water Resources (IWR), a study of the workload and compliance costs that would be incurred by the July 21, 1999, proposal. The study report will be available on the Internet at the Corps headquarters regulatory home page. This study demonstrated that the proposal published in the July 21, 1999, **Federal Register** would result in substantial increases in workload and costs to the Corps and the regulated public. The proposed new and modified NWPs, including the three proposed general conditions, would result in a 50% increase in the number of standard permit applications received by the Corps each year. The proposed new and modified NWP package would increase the Corps costs for processing permit applications at the current levels of service by $11.5 million annually, nearly a 15% increase over FY 1998 program funding. In addition, the July 21, 1999, proposal would also increase the direct compliance costs incurred by the regulated public by $46 million annually. In contrast, the modifications to the new and modified NWPs issued today (*i.e.,* the ½ acre limit and the revised floodplain condition) would result in impacts very similar to the IWR estimate for a ½ acre approach to the NWPs. That IWR estimate was 40% fewer standard permit applications than the July 21, 1999, proposal and 30% less in direct compliance costs. It is also important to note that the modified NWPs being issued today will protect the aquatic environment substantially better than the July 21, 1999, proposal would. These final NWPs are also less complex than the proposed NWPs, which will assist the regulated public.

Many commenters stated that the proposed new and modified NWPs, including the proposed general conditions, violate the Administrative Procedures Act (APA). These commenters said that the Corps has failed to provide an adequate administrative record and failed to demonstrate that the proposed acreage limits and other restrictions are necessary to provide protection for the aquatic environment. Some of these commenters stated that the Corps must provide an environmental basis for the acreage limits of the new and modified NWPs. Several commenters said that the proposal to issue new and modified NWPs to replace NWP 26 falls under the jurisdiction of the APA, because these NWPs are an agency statement of general applicability to implement, interpret, or prescribe a law or policy. A number of commenters stated that the proposed NWPs violate the APA because the schedule published in the

July 21, 1999, **Federal Register** notice implies that the decision to issue these NWPs and new general conditions was predetermined and the schedule did not include adequate time for the Corps to carefully consider comments received in response to that notice.

The new and modified NWPs issued today comply with Section 404(e), which requires notice and opportunity for public hearing. The Corps notice and comment process is virtually the same as the APA process. We have prepared an adequate administrative record to justify the issuance of these NWPs. In addition, we have fully considered all comments received in response to the July 21, 1999, **Federal Register** notice to determine the terms and conditions for the new and modified NWPs. This included three extensions of the final NWP issuance in order to fully and fairly consider all comments.

The acreage limit for an NWP is established so that the NWP authorizes most activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively. However, since NWPs are issued for national applicability, the terms and conditions of NWPs, including the acreage limits, must be restrictive enough to ensure that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment, individually and cumulatively, across the country. The NWPs also contain notification requirements that provide district engineers with the opportunity to review certain activities to determine if those activities will result in minimal adverse effects on the aquatic environment. Aquatic resource functions and values vary considerably across the country. Therefore, the minimal adverse effects determination by Corps districts is based site-specific or regional criteria.

The acreage limits of the new and modified NWPs do not preclude any proposed activity from qualifying for a DA permit. If a proposed activity does not meet the terms and conditions of an NWP, then that activity could be authorized by other forms of DA permits. Regional general permits may be available to authorize certain activities that have minimal adverse effects on the aquatic environment based on local environmental conditions. The proposed work may also be authorized by individual permits, including letters of permission, if the activity involves more than minimal adverse effects on the aquatic environment.

We recognize that there are specific activities or classes of activities in areas of the country that will result in minimal adverse effects on the aquatic environment, but exceed the acreage limits of the new and modified NWPs. Corps districts can develop regional general permits in the future to authorize these activities.

Several commenters stated that the Corps is obligated to minimize regulatory burdens on small businesses, as required by Small Business Regulatory Enforcement Fairness Act of 1996. Two commenters said that the Corps is not in compliance with the Regulatory Flexibility Act because an ''initial regulatory flexibility analysis'' was not provided in the **Federal Register** notice. One commenter indicated that the Corps must comply with the Congressional Review Act. Another commenter said that the July 21, 1999, proposal to issue new and modified NWPs does not comply with Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' because the Corps has not identified the takings implications of the proposed NWPs.

The new and modified NWPs comply with the Small Business Regulatory Enforcement Fairness Act of 1996 because they provide an expedited authorization for activities in waters of the United States that have minimal adverse effects on the aquatic environment. We are not required to provide an initial regulatory flexibility analysis because we proposed to issue new and modified NWPs, not change our regulations. The Corps believes it is not required to submit the final new and modified NWPs to Congress pursuant to the Congressional Review Act, but as a matter of comity, we will submit the final NWPs to Congress. The new and modified NWPs will not result in the taking of private property because the NWPs provide an expedited authorization process for certain activities in waters of the United States that have minimal individual and cumulative adverse effects on the aquatic environment but require a Corps permit. If a proposed activity does not comply with the terms and conditions of an NWP, then the project proponent can request another form of DA permit, including regional general permits, letters of permission, or individual permits. Therefore, there are no takings implications for these NWPs.

General Terms and Limits of NWPs

One commenter stated that the acreage limits for the new and modified NWPs are too high. One commenter said that the NWPs should not have an acreage limit greater than 1 acre. Other commenters recommended maximum acreage limits of ⅓ acre and ¼ acre. Several commenters suggested higher acreage limits for NWP activities in ephemeral streams located in the western United States. Two commenters said that the NWPs should have lower acreage limits for activities in certain types of wetlands, such as forested wetlands, playas, prairie potholes, vernal pools, kettles, pocosins, and bogs. Two commenters opposed the use of indexed acreage limits.

We have fully considered comments concerning acreage limits for the new and modified NWPs. To simplify the new and modified NWPs and ensure that these NWPs still authorize only activities with minimal individual and cumulative adverse effects on the aquatic environment, all of the new NWPs, except for NWP 41, will have a ½ acre limit. We have not imposed a ½ acre limit on NWP 41 because it only authorizes activities that benefit the aquatic environment. The acreage limits for specific NWPs are discussed in detail in the preamble discussions for each NWP. Division engineers can regionally condition these NWPs to lower acreage limits if there are specific concerns for the aquatic environment in a particular part of the country. We do not agree that there should be higher acreage limits on the NWPs for discharges of dredged or fill material into ephemeral streams in the western states, due to the national scope of the NWPs. However, Corps districts may issue RGPs with larger acreage thresholds in any local situations where they determine that the activity would result in no more than minimal adverse effects, individually or cumulatively. Division engineers can also regionally condition these NWPs to restrict or prohibit their use in certain types of high value waters of the United States. We have eliminated the indexed acreage limits from NWPs 39 and 40 because the simple ½ acre limit is a more effective way to ensure that these NWPs authorize only activities with minimal adverse effects and the vast majority of activities authorized by NWP 26 are below or slightly above ½ acre.

Many commenters indicated that the PCN thresholds for the new and modified NWPs should be ⅓ acre, instead of ¼ acre. These commenters believe the difference between these two notification thresholds is too small to provide any value and that the lower PCN threshold will increase the Corps workload without providing any benefits. One commenter recommended providing more consistency in PCN thresholds for the NWPs. Several commenters stated that PCNs should be

required for all activities authorized by NWPs and one commenter remarked that PCNs should be required for all discharges into special aquatic sites. One commenter said that lower acreage limits for the NWPs should result in fewer PCN requirements, not a lowering of PCN thresholds.

To further ensure that the new NWPs authorize only activities with minimal adverse effects on the aquatic environment, we have established a 1/10 acre PCN threshold for the new NWPs (except for NWP 41) and retained the original PCN thresholds for impacts to open waters, including streams. The notification threshold for NWP 14 has also been lowered to 1/10 acre. The 1/10 acre PCN threshold will result in a workload increase for Corps districts, but we believe that this increase will be minor, since many permittees request written verification of NWP authorizations, even when notification is not required. We believe that the PCN thresholds in the new and modified NWPs are consistent. There are circumstances, such as NWP 39 activities that impact open waters, where we believe it is necessary to review all proposed activities. However, we do not agree that is necessary to require notification for all NWP activities because most minor activities authorized by NWPs result in minimal adverse effects. Division engineers can impose regional conditions on NWPs to lower PCN thresholds in those geographic areas where there is the potential for more than minimal adverse effects on the aquatic environment. We do not agree that lower acreage limits should result in fewer PCN requirements because the notification process is necessary to address activities that might result in more than minimal adverse effects.

Several commenters suggested adding PCN requirements for discharges into ephemeral streams, not just perennial and intermittent streams, because ephemeral streams are important in arid regions. One commenter recommended reducing the 500 linear foot PCN threshold for perennial and intermittent stream impacts to 200 linear feet. One commenter said that PCNs should be required for all discharges into open waters to allow district engineers to determine appropriate vegetated buffer requirements.

Except for those NWPs that require notification for all activities or all discharges of dredged or fill material into open waters, we believe that notification requirements for stream impacts should be limited to perennial and intermittent streams, since discharges of dredged or fill material into ephemeral streams are likely to result in minimal adverse effects. In geographic areas where discharges of dredged or fill material into ephemeral stream beds may result in more than minimal adverse effects on the aquatic environment, division engineers can regionally condition these NWPs to require notification for these activities. For some of the new NWPs, we have replaced the 500 linear foot PCN threshold for stream bed impacts with a 300 linear foot limit. Division engineers can impose regional conditions to require a PCN threshold to address activities that may result in more than minimal adverse effects. With the exception of NWP 39, we do not agree that it is necessary to require notification for all discharges of dredged or fill material into open waters to determine vegetated buffer requirements. Vegetated buffers are not required for all activities authorized by the NWPs. District engineers will determine on a case-by-case basis when it is appropriate to require vegetated buffers next to open waters.

Cumulative Impact Assessment and Data Collection

Many commenters objected to the Corps position stated in the July 21, 1999, **Federal Register** notice that the Corps can monitor only those cumulative adverse effects on the aquatic environment that result from activities permitted by the Corps regulatory program. Some of these commenters said that this position is contrary to the Clean Water Act and recommended that the Corps utilize the definition of cumulative impacts found in the regulations for the National Environment Policy Act (NEPA). Numerous commenters asserted that cumulative impact analysis should include both regulated and unregulated losses of aquatic habitat within a geographic area. One commenter said that cumulative impact analysis should include all activities that affect water quality. Two commenters objected to the Corps statement in the July 21, 1999, **Federal Register** notice that district engineers must have clear, extensive, and unequivocal evidence that activities regulated pursuant to section 404 of the Clean Water Act or section 10 of the Rivers and Harbors Act are causing more than minimal cumulative adverse effects on the aquatic environment, not unregulated activities, before revoking or suspending the use of NWPs. One commenter stated that cumulative impact assessment should consider temporary and permanent losses of waters of the United States in a different manner. This commenter also remarked that the cumulative impact assessment must also consider both losses of waters of the United States and compensatory mitigation to determine the net cumulative adverse effects on the aquatic environment.

The Corps position in the July 21, 1999, **Federal Register** notice concerning cumulative impact assessment is based on the statutory requirements of Section 404(e) of the Clean Water Act. There are no other references to cumulative adverse effects in Section 404 of the Clean Water Act. The requirement for authorized activities to cause no more than minimal adverse effects on the aquatic environment applies only to general permits (including NWPs), not the entire Corps regulatory program. This position is also supported by the regulations for implementing the Section 404(b)(1) guidelines at 40 CFR 230.7. These regulations state that activities authorized by general permits can result only in minimal adverse effects on water quality and the aquatic environment (see 40 CFR 230.7(a)(3)).

The Corps scope of analysis for the purposes of NEPA is discussed in 33 CFR part 325, appendix B. The Corps can only address the impacts of the specific activity that requires a Department of the Army permit and those portions of the activity over which the district engineer has sufficient control and responsibility to warrant Federal review.

The Corps does provide different consideration to temporary and permanent losses of waters of the United States when assessing the adverse effects of regulated activities on the aquatic environment. As discussed in the NWP definition of ''loss of waters of the United States,'' waters of the United States that are temporarily filled, flooded, excavated, or drained, but restored after construction, are not included in the measurement of loss of waters of the United States. Therefore, temporary losses would not be included in the Corps cumulative impact assessment since the affected areas would be restored as waters of the United States. When assessing cumulative adverse effects on the aquatic environment, the Corps also considers compensatory mitigation for losses authorized by NWPs, because compensatory mitigation is often required to offset losses of waters of the United States and ensure that the activities authorized by NWPs have minimal adverse effects. Corps districts assess cumulative impacts on a watershed basis. Attempting to assess cumulative impacts across the nation is not possible, or appropriate.

Two commenters supported the Corps assertion that cumulative impacts must be assessed on a watershed basis. One of these commenters said that watersheds should be defined by the 8-digit watershed cataloging units designated by the U.S. Geological Survey (USGS). Two commenters requested that the Corps develop a method to quantify potential cumulative and indirect impacts that will result from activities authorized by NWPs in a watershed. Two commenters said that district engineers must demonstrate that the use of NWPs in a watershed or geographic area will not result in more than minimal adverse effects on the aquatic environment.

As discussed in the July 1, 1998, **Federal Register** notice, the Corps utilizes the 8-digit hydrological unit codes developed by USGS to identify watersheds for its data collection process. However, district engineers can utilize subwatersheds within these hydrological units when conducting cumulative impact assessments. The Corps does not have the resources to develop a method to quantify potential cumulative and indirect impacts that may result from activities authorized by NWPs. If the division or district engineer determines that the use of NWPs to authorize activities within a particular watershed or geographic area will result in more than minimal individual or cumulative effects on the aquatic environment, then he or she can modify, suspend, or revoke those NWPs in that area (see 33 CFR 330.4). This is a determination that must be made by districts as they administer the Corps regulatory program in specific geographic areas.

Two commenters said that the Corps should analyze the cumulative impacts of the current NWPs and any NWPs that will be proposed in the future before issuing the new and modified NWPs. These commenters recommended that this analysis consider the efficiency of compensatory mitigation. Two commenters objected to the Corps assertion that it cannot make the individual and cumulative adverse effects determination nationally.

When the Corps issues or modifies an NWP, an environmental assessment, a finding of no significant impact (FONSI), and if necessary, an evaluation of compliance with the Section 404(b)(1) guidelines is prepared for each NWP. These items are contained in one document. This document includes an analysis of the cumulative impacts that are expected to occur during the time the NWP is in effect. This analysis also includes estimates of the amount of compensatory mitigation that will be required to offset losses of waters of the United States authorized by the NWP. We maintain our position that an assessment of cumulative adverse effects that result from the use of the NWPs cannot be made at the national level, and that the only technically sound method to conduct this assessment is on a watershed basis, through the district offices. Concurrent with the issuance of the new and modified NWPs and the final decision documents for each of the new and modified NWPs, division engineers will issue supplementary decision documents that address the impacts of the NWPs in Corps districts.

Several commenters said that Corps record-keeping methods are inadequate and that the Corps should issue quarterly public reports on wetland losses and the status of compensatory mitigation. A number of commenters recommended that the Corps establish a data collection system that tracks various types of compensatory mitigation (i.e., creation, restoration, enhancement, preservation) and monitors compliance with the goal of no net loss. Numerous commenters indicated that the Corps needs to commit to stronger monitoring and enforcement efforts.

We do not have the resources to publish quarterly reports on impacts to waters of the United States and compensatory mitigation at this time. The data collection systems for most Corps districts do not currently differentiate between the amounts of compensatory mitigation provided through restoration, enhancement, creation, or preservation. Instead, most districts track the total amount of compensatory mitigation required for Corps permits. The effectiveness of compensatory mitigation efforts is monitored by district engineers on a case-by-case basis to the extent allowed by workload and personnel resources. Therefore, we cannot collect this type of information for all activities. We are committed to strong enforcement and monitoring efforts, but enforcement and compliance efforts are limited to available district resources. The Corps permit evaluation workload must take precedence over enforcement and monitoring.

Compliance with the National Environmental Policy Act

Several commenters stated that the proposed NWPs require an Environmental Impact Statement (EIS). Two commenters objected to the Corps statement in the July 21, 1999, **Federal Register** notice that the NWP program does not require an EIS because the NWPs can only authorize activities with minimal individual and cumulative adverse effects on the aquatic environment.

We maintain our position that the NWPs do not require an EIS, but we are in the process of preparing a Programmatic Environmental Impact Statement (PEIS) for the NWP program.

A number of commenters indicated that the Corps needs to reevaluate the Finding of No Significant Impact (FONSI) issued on June 23, 1998, since the draft NWPs are substantially different from the NWPs proposed in the July 1, 1998, **Federal Register** notice. These commenters said that the three proposed new general conditions warrant reevaluation of the FONSI.

We do not agree that the FONSI issued on June 23, 1998, requires revision. The FONSI issued on June 23, 1998, was a general statement of findings for the NWP program. That FONSI did not address a specific set of NWPs. The three proposed new general conditions are intended to provide additional protection to the aquatic environment and their implementation would not substantially change the scope of the FONSI issued on June 23, 1998, or its findings.

Two commenters said that the Corps should release or issue the Environmental Assessments (EAs) for the new and modified NWPs before those permits are issued so that the public can comment on those EAs. These commenters stated that the EAs should also include regional analyses in addition to the national analyses. One of these commenters indicated that the EAs should contain analyses of potential impacts on recreation, wildlife habitat, endangered species, cultural resources, land use, and habitat degradation, as well as address cumulative impacts that occur when an NWP is used with other NWPs. Another commenter requested that the EAs assess the expansion of geographic scope of the new NWPs, the amount of cumulative and individual impacts that may be authorized by these NWPs, the types of waters that may be adversely affected by the new and modified NWPs, and the functions of those waters. Other commenters objected to the preliminary EAs, stating that those EAs did not include an ecological rationale for the proposed acreage limits.

We do not agree that it was necessary to issue new preliminary EAs for the draft NWPs proposed in the July 21, 1999, **Federal Register** notice. We received few comments in response to the preliminary EAs that were issued with the July 1, 1998, **Federal Register**

notice. Those individuals that commented on the preliminary EAs requested that the Corps include an alternatives analysis in each EA. We have included an alternatives analysis in each EA for the new and modified NWPs. The EAs for the new and modified NWPs issued today discuss, in general terms, the acreage limits for these NWPs, the types of waters subject to the new and modified NWPs, and the functions of those waters. The EAs also include projected impacts to waters of the United States that will occur through the use of these NWPs. Since aquatic resource functions and values vary considerably across the country, we cannot include detailed ecological analyses to support the acreage limits for these NWPs. However, division engineers will be issuing supplemental EAs that will address issues at the district level.

The final EAs for the new and modified NWPs have been substantially modified from the preliminary EAs issued in conjunction with the July 1, 1998, **Federal Register** notice. The final EAs contain general discussions of potential individual and cumulative impacts to the 20 public interest review factors at 33 CFR 320.4 and the factors in Subparts C through F of the Section 404(b)(1) guidelines (40 CFR Part 230).

In response to the July 21, 1999, **Federal Register** notice, some commenters addressed the Programmatic Environmental Impact Statement (PEIS) of the NWP program that the Corps is preparing. One commenter supported the PEIS, but asserted that an EIS is required. Another commenter stated that the PEIS is unwarranted and unnecessary. Many commenters said that the Corps cannot finalize the NWPs before the PEIS is completed.

These issues concerning the PEIS were addressed in the July 21, 1999, **Federal Register** notice (see 64 FR 39265) and we have not changed our position.

Compliance with the Endangered Species Act

Two commenters stated that the proposed NWPs require Endangered Species Act (ESA) Section 7 consultation. Three commenters asserted that the proposed new and modified NWPs do not comply with ESA. One of these commenters said that the Corps does not adequately address the direct, secondary, and cumulative impacts on endangered and threatened species that will result from activities authorized by the NWPs. This commenter also stated that the Corps cannot rely on prospective permittees to conduct adequate investigations to determine whether endangered or threatened species or designated critical habitat occur on the project site. Three commenters indicated that compliance with ESA cannot be ensured for activities that do not require notification to the district engineer.

We have requested programmatic ESA consultation for the NWP program. We contend that the new and modified NWPs, through the requirements of General Condition 11, comply with ESA. We use the ESA interagency consultation regulations at 50 CFR Part 402 when determining compliance with ESA. Scope of analysis issues for ESA will be resolved through consultation with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). General Condition 11 requires non-Federal permittees to notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project. The permittee shall not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized.

Three commenters asserted that the Corps cannot issue the new and modified NWPs prior to completing programmatic ESA consultation. One commenter stated that programmatic ESA consultation does not obviate the need for regional and site-specific consultation. One commenter said that since Standard Local Operating Procedures for Endangered Species (SLOPES) have not yet been completed, the Corps cannot rely on SLOPES to ensure compliance with ESA. One commenter suggested that SLOPES should be developed for all issued NWPs.

We can issue the NWPs prior to the completion of the NWP programmatic ESA consultation, because issuance of the NWPs has not foreclosed opportunities to address endangered species and the NWPs already contain safeguards to ensure compliance with ESA. The programmatic consultation will provide additional assurance that the existing NWPs, as well as the new and modified NWPs issued today, have a formal process to develop any necessary additional procedures at the district level. The programmatic consultation will provide further assurance that the NWP program does not jeopardize the existence of any Federally-listed threatened or endangered species, or destroy or adversely modify the critical habitat of such species. Both the programmatic ESA consultation and the PEIS will address potential cumulative effects on endangered and threatened species and their designated critical habitat regarding the NWP program. We maintain that the SLOPES help ensure compliance with the ESA at the district level. Districts can meet with local offices of the FWS and NMFS at any time to modify or improve their SLOPES. Districts will enter case-specific consultation in any case where the district determines the proposed project may affect a threatened or endangered species.

In addition to NWP General Condition 11, division and district engineers have imposed and can impose additional regional conditions on the NWPs and case-specific special conditions to address endangered or threatened species or their critical habitat. For example, Corps regional conditions can prohibit the use of NWPs in designated critical habitat for endangered or threatened species or require notification for activities in areas known to be inhabited by threatened or endangered species. Some Corps districts have conducted programmatic consultation for specific geographic areas. Also, Corps districts have and will conduct case-specific Section 7 consultation for endangered species. These efforts usually consider the NWP program in that particular area. In summary, General Condition 11, Corps regional conditions, case-specific special conditions, and SLOPES will ensure that the NWP program complies with ESA.

Stream Impacts

Many commenters objected to the proposed NWPs, stating that thousands of feet of stream bed could be channelized or filled under these NWPs. These commenters said that linear foot limits for stream bed impacts should be imposed on the NWPs instead of acreage limits. A large number of commenters recommended adding a 250 linear foot limit for stream bed impacts to the new and modified NWPs. Other commenters suggested linear stream bed impact limits of 200, 100, and 50 linear feet. A few commenters said that the NWPs should not authorize any stream impacts. Another commenter requested clarification regarding the PCN thresholds for linear feet of stream bed impacts, asking if the flooded area is included with the filled area.

After consideration of these comments, we have decided to impose on NWPs 39, 40, 42, and 43, a 300 linear foot limit for filling or excavation activities in stream beds. This 300 linear foot limit applies only to stream beds that normally have flowing water.

Division engineers can regionally condition the NWPs to lower the 300 linear foot limit for stream bed impacts, impose linear foot limits for stream bed impacts on other NWPs, or establish lower PCN thresholds for filling or excavating stream beds.

Several commenters stated that all Corps districts must use the same method to determine where the average annual flow of a stream is 1 cfs. One of these commenters recommended using drainage area as a substitute. Another commenter suggested that the guidance in the preamble to the final rule for the NWP regulations (33 CFR part 330) published in the November 22, 1991, **Federal Register** (56 FR 59112) should be used to establish where the 1 cfs point of a stream is located. That guidance described how to determine the geographic location of the limit of headwaters for perennial, intermittent, and ephemeral streams.

District engineers will utilize the best methods available to identify where the average annual flow of a stream is 1 cfs. Although the guidance published in the November 22, 1991, **Federal Register** was intended to assist district engineers and the regulated public in identifying the geographic location of headwaters (i.e., where the average annual flow is less than 5 cfs), this guidance can also be used to locate the 1 cfs point on a stream. District engineers can utilize the median flow, rather than the average flow, to establish where the 1 cfs point on a stream is located. This approach recognizes that streams with highly irregular flows, such as those occurring in the western portion of the United States, could be dry at the 1 cfs point for most of the year and still average, on an annual basis, a flow of 1 cfs because of high volume, flash flood type flows which greatly distort the average. Furthermore, we recognize that using the median flow for an entire year in streams that have no stream flow for over half the year but with flows greater than 1 cfs for several months would also distort the average. It should also be noted that precision is not required in establishing the 1 cfs point. The definition allows the district engineer to use approximate means to compute it. The drainage area that will contribute an average annual flow of 1 cfs can be estimated by approximating the proportion of average annual precipitation that is expected to find its way into the stream. Knowing the amount of area that will produce this flow in a particular region, the 1 cfs point can be approximated from drainage area maps. For example, in most areas of the eastern United States (i.e., east of the Mississippi River), one square mile of drainage area produces 1 cfs of stream flow annually.

Applicable Waters for the New and Modified Nationwide Permits

A number of commenters objected to the increased scope of waters in which the proposed NWPs published in the July 21, 1999, **Federal Register** could be used. One commenter stated that the NWPs should be used only in headwaters and isolated waters. Two commenters supported the use of the new and modified NWPs in non-tidal waters. Three commenters objected to prohibiting the use of the new and modified NWPs in tidal waters and non-tidal wetlands adjacent to tidal waters. One commenter stated that the Corps has not provided justification for excluding the new and modified NWPs from non-tidal wetlands that are adjacent to tidal waters and recommended that the Corps utilize the term ''contiguous'' instead of ''adjacent.''

We contend that limiting the new NWPs to non-tidal waters, except for non-tidal wetlands adjacent to tidal waters, provides adequate protection of the aquatic environment and helps ensure that these NWPs authorize only activities with minimal adverse effects. Regional conditioning of the new and modified NWPs by division engineers will provide additional protection by restricting or prohibiting the use of the new and modified NWPs in high value waters. General Condition 25 will also protect high value waters. General Condition 26 does not allow permanent, above-grade fills in the 100-year floodplain downstream of the headwaters.

We do not agree that the new and modified NWPs should be used in tidal waters or non-tidal wetlands adjacent to tidal waters. We have identified tidal waters as high value waters on a national basis. Non-tidal wetlands adjacent to tidal waters contribute to the ecological integrity of tidal waters and should not be subject to the new and modified NWPs. District engineers can develop regional general permits for discharges into non-tidal waters adjacent to tidal waters, if such regional general permits are needed for activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively.

One commenter requested that the Corps define the term ''adjacent'' for the purposes of the new and modified NWPs. One commenter stated that the definition of the term ''adjacent'' at 33 CFR 328.3(c) is confusing for use in the NWP program and that the Corps needs to provide a definition that is easily understandable by the regulated public. This commenter also said that the NWPs should be limited to only those non-tidal wetlands that are both adjacent to and inundated by spring tides; wetlands landward of the mean high tide line would be considered as non-tidal wetlands adjacent to tidal waters and wetlands landward of the spring high tide line would not be considered adjacent to tidal waters. Two commenters asked the Corps to provide a clear explanation of the upstream limit of non-tidal wetlands adjacent to tidal waters and whether non-tidal wetlands miles upstream of tidal waters would be considered adjacent to those tidal waters.

For the new and modified NWPs, the definition of the term ''adjacent'' at 33 CFR 328.3(c) will be used. Since aquatic systems vary considerably across the country, we cannot establish more specific criteria at a national level to further define adjacency. District engineers will make appropriate determinations of adjacency, based on regional hydrologic conditions.

Wetlands located between mean high water and the spring high tide line are tidal wetlands because they are inundated by tidal waters (see 33 CFR 328.4(b)(1)). Non-tidal wetlands that are bordering, contiguous, or neighboring to tidal waters are considered adjacent to those tidal waters. The upstream limit of non-tidal wetlands adjacent to tidal waters is determined by the degree of influence of the tidal waterbody on non-tidal wetlands. Those non-tidal wetlands that exert direct hydrologic influence on tidal waters are considered adjacent to those tidal waters. For the purposes of the NWPs, non-tidal streams located upstream of the head of tide are not considered adjacent to tidal waters, although those streams eventually flow into tidal waters and are part of the surface tributary system. Wetlands adjacent to non-tidal streams are within the scope of waters for the new and modified NWPs.

One commenter stated that the new and modified NWPs should not authorize discharges into prairie potholes, playa lakes, or vernal pools. Another commenter said that the NWPs should not be used in rare and irreplaceable wetlands.

We do not agree that the new and modified NWPs should be subject to a national prohibition against discharges of dredged or fill material into prairie potholes, playa lakes, or vernal pools. Rare and irreplaceable wetlands have not been formally defined. General Condition 25 restricts activities in designated critical resource waters. Further, division engineers can

regionally condition these NWPs to restrict or prohibit discharges into high value waters. For those activities that require notification, district engineers can exercise discretionary authority if the proposed work will result in more than minimal adverse effects on the aquatic environment.

Mitigation

A large number of commenters specifically addressed the compensatory mitigation requirements of the proposed new and modified NWPs. One commenter said that the goal of compensatory mitigation is not clearly defined in the proposed NWPs. Several commenters requested that the Corps clarify when compensatory mitigation is required for activities authorized by NWP. These commenters said that there are some inconsistencies concerning compensatory mitigation requirements in the July 21, 1999, **Federal Register** notice. Two of these commenters referred to Corps statements in the July 21, 1999, **Federal Register** notice that: (1) Compensatory mitigation will normally be required for activities that require notification and, (2) in some circumstances, compensatory mitigation may be unnecessary because the adverse effects on the aquatic environment are minimal without mitigation.

For the NWP program, including the new and modified NWPs, the purpose of compensatory mitigation is to ensure that the authorized work results in minimal adverse effects on the aquatic environment. For those activities that require notification to the district engineer, compensatory mitigation may be necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment. District engineers will determine, on a case-by-case basis, when compensatory mitigation is not practicable. Our use of the word ''normally'' when referring to compensatory mitigation for NWP activities allows district engineers flexibility in determining when compensatory mitigation will be required and lets the regulated public know that compensatory mitigation is likely to be required for impacts that exceed PCN thresholds, except under circumstances where the adverse effects are minimal without compensatory mitigation. Activities that do not require notification are presumed to result in minimal adverse effects and do not require compensatory mitigation to ensure minimal adverse effects. Division engineers can regionally condition an NWP to lower the notification threshold to allow district engineers to determine, on case-by-case basis, if compensatory mitigation is necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment.

Many commenters opposed the use of compensatory mitigation to ensure that activities authorized by NWPs result in minimal adverse effects on the aquatic environment. Several commenters supported the use of compensatory mitigation to ensure that authorized activities result in minimal adverse effects. One of these commenters said that compensatory mitigation should not be required simply to meet a ''no net loss'' of wetland acreage goal. One commenter indicated that compensatory mitigation should not be required for activities authorized by NWP because NWPs can only authorize activities with minimal adverse effects.

Compensatory mitigation is often necessary to offset losses of waters of the United States and ensure that the authorized activity results in minimal adverse effects on the aquatic environment. The NWP regulations at 33 CFR 330.1(e)(3) allow permittees to provide compensatory mitigation to reduce the adverse effects of the proposed work to the minimal level. In the July 21, 1999, **Federal Register** notice, we stated that for the purposes of the NWP program, compensatory mitigation is required to ensure that the authorized activities result in minimal adverse effects on the aquatic environment, individually or cumulatively, not to achieve ''no net loss'' of wetland acreage. NWP compensatory mitigation requirements are not driven by the ''no net loss'' goal, but will help support that goal. A district engineer can determine, for an activity that requires notification, that compensatory mitigation is not practicable.

Two commenters said that compensatory mitigation should be required only for impacts to waters of the United States. Another commenter stated that the Corps is proposing to require mitigation for activities not subject to its regulatory authority, such as flooding, excavation, and drainage activities. One commenter indicated that the July 21, 1999, **Federal Register** notice requires compensatory mitigation for non-wetland impacts. One commenter remarked that compensatory mitigation for wetland or stream losses should be subject to a public notice process because mitigation is being used to avoid significant impacts.

Compensatory mitigation may be required by district engineers to offset losses of waters of the United States to ensure that the authorized work results in minimal adverse effects on the aquatic environment. Although district engineers may require out-of-kind compensatory mitigation, such as the restoration of upland riparian zones, to compensate for losses of the functions and values of waters of the United States, compensatory mitigation is required only to offset losses of waters of the United States. District engineers can require compensatory mitigation for losses of aquatic resource functions and values caused by flooding, excavation, and drainage caused by activities that are associated with activities that are regulated by the Corps (i.e., discharges of dredged or fill material). However, if the activity does not involve work in navigable waters of the United States or a discharge of dredged or fill material into waters of the United States, compensatory mitigation cannot be required because no Corps permit is necessary to conduct the activity. We do not agree that a public notice process is required for compensatory mitigation projects.

Several commenters stated that the mitigation requirements discussed in the July 21, 1999, **Federal Register** notice do not adequately protect wetlands. Numerous commenters said that the NWPs should be conditioned to require a full alternatives analysis. Many commenters requested that the Corps condition all NWPs to require project proponents to avoid impacts to the maximum extent practicable and implement compensatory mitigation that fully replaces all losses of wetland acreage and functions. One commenter objected to including minimization as a form of mitigation. Two commenters asserted that the NWPs should be subject to the mitigation requirements of the 1990 mitigation Memorandum of Agreement (MOA), including sequencing requirements.

The mitigation requirements of the new and modified NWPs adequately protect wetlands. General Condition 19 requires permittees to avoid and minimize discharges into waters of the United States on-site to the maximum extent practicable. General Condition 19 also states that district engineers can require compensatory mitigation to ensure that the authorized work results in minimal adverse effects on the aquatic environment. The use of minimization as mitigation is well established in Federal regulations (see the Council on Environmental Quality's regulations at 40 CFR 1508.20). The avoidance provisions of the 1990 mitigation MOA apply only to standard individual permits, not activities authorized by NWPs.

One commenter stated that some of the new NWPs (e.g., NWPs 39 and 43)

require compensatory mitigation without requiring submission of a notification to the district engineer. This commenter said that compensatory mitigation should not be required unless the district engineer reviews the PCN and determines that compensatory mitigation is necessary to offset authorized losses of waters of the United States. One commenter objected to requiring compensatory mitigation for activities that require notification, but another commenter supported this requirement. Two commenters objected to allowing district engineers to make the final determination whether compensatory mitigation is required.

Compensatory mitigation is not required for NWP activities that do not require notification to the district engineer. Division engineers can regionally condition NWPs to lower PCN thresholds or require notification for all activities, if such PCN thresholds are necessary to allow district engineers to require compensatory mitigation to ensure that adverse effects to the aquatic environment are minimal. We believe that it is appropriate for district engineers to make the final decisions whether compensatory mitigation is necessary to ensure that activities authorized by NWPs result in minimal adverse effects.

A large number of commenters recommended that the Corps require acre-for-acre wetland restoration as compensatory mitigation for all activities resulting in the loss of greater than ¼ acre of wetlands. Other commenters suggested ½, ⅓, and 1 acre thresholds for requiring compensatory mitigation. Many commenters said that a minimum 1:1 mitigation ratio should be required for all losses of waters of the United States authorized by NWPs. Other commenters recommended higher mitigation ratios. One commenter said that the Corps should provide compensatory mitigation guidelines that addresses site selection and design, options for compensatory mitigation, and a description of success criteria and monitoring requirements.

While final specific compensatory mitigation requirements, such as replacement ratios, are determined by district engineers on a case-by-case basis, we agree that there should be a minimum requirement of an acre-for-acre (1:1) wetland replacement as compensatory mitigation for all activities requiring notification. The Corps can require compensatory mitigation in excess of a 1:1 ratio of impact acreage to compensatory mitigation acreage to adequately replace aquatic resource functions and values that are lost as a result of activities authorized by NWPs. The Corps can also accept out-of-kind compensatory mitigation, if it is best for the aquatic environment. Existing policy and guidance for compensatory mitigation provides a preference for on-site and in-kind replacement of the functions and values of the impacted aquatic resource. If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area if practicable, (*i.e.,* in close proximity and, to the extent possible, the same watershed) or environmentally preferable. The Corps can also accept out-of-kind compensatory mitigation, if it is best for the aquatic environment.

Many commenters stated that the Corps should require in-kind, on-site replacement of wetlands. Several commenters supported the utilization of off-site, out-of-kind compensatory mitigation for losses of waters of the United States authorized by NWPs. These commenters also supported the Corps position that the appropriate compensatory mitigation required for activities authorized by NWPs should be based on what is best for the aquatic environment. One commenter remarked that the selected mitigation method should best replace site-specific functions and values of the impacted aquatic habitat. One commenter supported the use of out-of-kind compensatory mitigation, such as the establishment and maintenance of vegetated buffers next to streams, and stream restoration, and the preservation of wetland/upland complexes.

When reviewing compensatory mitigation proposals, district engineers will consider what is best for the aquatic environment, including requirements for vegetated buffers next to perennial and intermittent streams and other open waters. Wetland restoration, enhancement, creation, and, only in exceptional circumstances, preservation are not the only methods of providing compensatory mitigation for activities authorized by NWPs. Stream restoration and enhancement, including the restoration or preservation of riparian zones, can also provide compensatory mitigation for losses resulting from activities authorized by NWPs. The establishment and maintenance of vegetated buffers next to streams and other open waters as compensatory mitigation for losses of waters of the United States authorized by NWPs are discussed in the next section of this notice.

Many commenters opposed the Corps preference for the use of mitigation banks and in lieu fee programs to provide compensatory mitigation for losses of waters of the United States authorized by NWPs. A number of other commenters supported the Corps preference for consolidated compensatory mitigation methods. One commenter indicated that the preference for consolidated compensatory mitigation methods should not be limited to mitigation banks. One commenter expressed some support for using mitigation banks and other consolidated mitigation methods as alternatives for on-site compensatory mitigation because of the uncertainty for success in some individual compensatory mitigation projects. This commenter also recommended developing guidance for in lieu fee programs and other consolidated mitigation methods before allowing widespread use of these methods. Another commenter recommended that the text of the NWPs and the preamble to the notice announcing the issuance of the NWPs refer to the Federal guidance for compensatory mitigation, especially for the use of mitigation banks and in lieu fee programs. Two commenters indicated that in lieu fee programs should not be considered as compensatory mitigation until guidance has been developed for these programs. One commenter objected to the use of in lieu fee programs to provide compensatory mitigation because the commenter asserts that these programs are not subject to agency and public review and do not ensure compliance with the goal of no net loss.

Consolidated compensatory mitigation methods, including mitigation banks, are often an efficient means of compensating for losses of waters of the United States, particularly for multiple small activities. We recognize that consolidated compensatory mitigation methods are often more practicable and successful because of the planning and implementation efforts typically expended on these activities by their proponents. Individual efforts to create, restore, or enhance wetlands to replace small wetland losses may be unsuccessful because of poor planning and/or construction. Furthermore, consolidated mitigation efforts are often better monitored and maintained and often result in the establishment of larger contiguous wetland areas that benefit the overall local aquatic environment and many of the species that utilize larger aquatic habitats.

One commenter stated that where mitigation banks and in lieu fee programs are in the same watershed, preference should be given to using the mitigation bank since mitigation banks subject to more stringent requirements

and more likely to be successful. Two commenters said that mitigation banks should be located in the same watershed as the site of the NWP activity. One commenter said that in lieu fee programs should not be used as compensatory mitigation for activities that result in the loss of greater than 1/10 acre of waters of the United States.

Where practicable, mitigation banks and other consolidated mitigation methods should be located in the same watershed as the site of the activity authorized by NWP. District engineers have the authority to approve or disapprove the use of specific mitigation approaches as compensatory mitigation for losses of waters of the United States authorized by NWPs. Permittees should have the flexibility to utilize compensatory mitigation methods that are within their means to accomplish and meet the requirements to offset unavoidable losses of waters of the United States. To the extent practicable, permittees should consider use of approved mitigation banks and other forms of consolidated compensatory mitigation. We do not agree that there should be an acreage limit that would preclude the use of any particular type of mitigation to provide compensatory mitigation for losses of waters of the United States authorized by NWPs.

Several commenters stated that the preservation of high value wetlands should be encouraged as a form of compensatory mitigation. A number of commenters objected to the use of preservation as compensatory mitigation, unless one-to-one replacement of aquatic habitats has been achieved. One commenter objected to the use of enhancement unless one-to-one replacement of wetlands has been accomplished.

We concur that the preservation of high value wetlands is one appropriate method of compensatory mitigation for losses of waters of the United States, but only in exceptional circumstances. Preservation of aquatic habitats should be done in conjunction with aquatic habitat restoration, creation, or enhancement to offset losses of waters of the United States. The amount of preservation or enhancement that will be accepted as compensatory mitigation for impacts authorized by NWPs will be determined by district engineers on a case-by-case basis.

To further clarify the issue of mitigation, we have removed some of the mitigation information from General Condition 13 and consolidated the mitigation requirements for the NWPs in General Condition 19.

Vegetated Buffers

In the July 21, 1999, **Federal Register** notice, we proposed to require the establishment and maintenance of vegetated buffers adjacent to waters of the United States as an alternative form of compensatory mitigation to ensure that activities authorized by NWPs result in minimal adverse effects on the aquatic environment. The vegetated buffer requirement was in the draft NWP 39 and the proposed modifications to General Conditions 13 and 19.

As a result of our review of the comments received in response to the July 21, 1999, **Federal Register** notice, we have made several changes to the vegetated buffer requirements for the NWPs. For example, vegetated buffers are required only if there are perennial or intermittent streams or other open waters on the project site. Vegetated buffers will be established and maintained on the uplands or wetlands next to the open waters. For the purposes of the NWPs, vegetated buffers are not required next to ephemeral streams or wetlands. The use of vegetated buffers as mitigation for NWP activities is discussed in General Condition 19. The changes to the vegetated buffer requirements are discussed in more detail below.

Many commenters supported the vegetated buffer requirements for the new and modified NWPs. A number of commenters stated that vegetated buffers should not be a condition of an NWP authorization. These commenters said that vegetated buffers should be considered only when a landowner voluntarily agrees to establish and maintain vegetated buffers adjacent to waters of the United States as an alternative form of compensatory mitigation. Several commenters contend that compensatory mitigation sites should be protected by vegetated buffers. Another commenter stated that the use of upland buffers should be consistent with current Federal guidance, particularly the ''Federal Guidance for the Establishment, Use and Operation of Mitigation Banks'' (60 FR 58605). A commenter stated that the vegetated buffer requirement should not apply to all activities that require a Corps permit, such as piers.

Vegetated buffers will be required only when there are open waters, such as perennial or intermittent streams, on the project site, and the NWP activity involves discharges of dredged or fill material into waters of the United States. However, a required vegetated buffer could be established off-site for impacts on the project site. Project proponents will not be required to establish and maintain vegetated buffers next to ephemeral streams. Vegetated buffers are not normally required for activities that require only Section 10 permits, but district engineers can require vegetated buffers as compensatory mitigation for activities authorized by Section 10 permits, if such compensatory mitigation is appropriate. District engineers will determine, on a case-by-case basis, whether or not vegetated buffers are required. Vegetated buffers are required only when it is practicable for the permittee to establish these areas and the vegetated buffer will be self-maintaining, other than restrictions on cutting or removal of the buffer. If the permittee does not own the land next to the open waters, then vegetated buffers are not required unless the permittee can reasonably obtain the appropriate conservation easements for those buffers.

Compensatory mitigation sites can be protected by vegetated buffers, but we do not agree that this should be a requirement of the NWP program. However, providing a buffer to the restored waters of the United States in a mitigation bank is precisely why a good mitigation bank will have a matrix of waters and uplands for maximum ecological functions and values. The ''Federal Guidance for the Establishment, Use and Operation of Mitigation Banks'' does not contain any useful guidance concerning the establishment and maintenance of vegetated buffers next to open waters. During the revision of the vegetated buffer requirements for the NWPs, we considered the riparian forest buffer Conservation Practice Standard (Code 391A) issued by NRCS in July 1997. We also considered the information in the document entitled ''Riparian Forest Buffers: Function and Design for Protection and Enhancement of Water Resources'' published by the Forest Service.

A large number of commenters opposed the vegetated buffer requirement. Those in opposition to this requirement were divided into two groups. One group objected to vegetated buffers as compensatory mitigation for discharges of dredged or fill material into wetlands because they believe that wetland losses should be compensated only through wetland restoration, creation, or enhancement. The other group of commenters stated that the Corps does not have the regulatory or statutory authority to require vegetated buffers adjacent to waters of the United States.

Those commenters that oppose the use of vegetated buffers as

compensatory mitigation for losses of wetlands indicated that vegetated buffers adjacent to waters of the United States do not replace the lost functions that would be provided by wetland restoration or creation. Many of these commenters said that vegetated buffers next to open waters and streams do not provide flood storage capacity, wildlife habitat, water quality, or groundwater recharge functions. Numerous commenters stated that using vegetated buffers as compensatory mitigation will not help the Administration achieve its goal of a net gain of 100,000 acres of wetlands per year. Other commenters indicated that vegetated buffers as compensatory mitigation is contrary to the ''no net loss'' goal. One commenter said that the use of vegetated buffers is contrary to the 1990 mitigation MOA.

Vegetated buffers next to streams and other open waters on the project site are an important type of compensatory mitigation that provides substantial aquatic habitat, water quality, and flood storage benefits. The establishment and maintenance of vegetated buffers may be a preferable form of compensatory mitigation because it may be infeasible to create or restore wetlands on the project site after the activity is built. Vegetated buffers, even if they are established on uplands next to streams and other open waters, would provide on-site aquatic habitat, water quality, and flood storage functions.

Vegetated buffers next to streams and other open waters provide many of the same functions that wetlands provide. In fact, many vegetated buffers will be wetlands. Due to their proximity to open waters, vegetated buffers are more effective at protecting open waters than wetlands distant from those open waters. We have refined the following list of the functions of vegetated buffers from the list of functions published in the July 21, 1999, **Federal Register** notice. In general, vegetated buffers next to streams and open waters provide the following functions: (1) Reduce adverse effects to water quality by removing nutrients and pollutants from surface runoff; (2) reduce concentrations of nutrients and pollutants in subsurface water that flows into streams and other open waters; (3) moderate storm flows to streams, which reduces downstream flooding and degradation of aquatic habitat; (4) stabilize soil (through plant roots), which reduces erosion in the vicinity of the open waterbody; (5) provide shade to the waterbody, which moderates water temperature changes and provides a more stable aquatic habitat for fish and other aquatic organisms; (6) provide detritus, which is a food source for many aquatic organisms; (7) provide large woody debris from riparian zones, which furnishes cover and habitat for aquatic organisms and may cause the formation of pools in the stream channel; (8) provide habitat to a wide variety of aquatic and terrestrial species; (9) trap sediments, thereby reducing degradation of the substrate that provides habitat for fish and other aquatic organisms (*e.g.,* some fish species depend upon gravel stream beds for spawning habitats); and (10) provide corridors for movement and dispersal of many species of wildlife. In addition, vegetated buffers next to streams provide flood storage capacity and groundwater recharge functions.

Although we are requiring the establishment and maintenance of vegetated buffers in uplands next to open waters as compensatory mitigation for certain activities, we expect to continue our documented programmatic no net loss of wetlands approach to the regulatory program. For most activities authorized by NWPs, vegetated buffers will only be a portion of the required compensatory mitigation. Moreover, where the project involves filling wetlands, vegetated buffers will only be required after a 1:1 ratio based on acreage of wetland mitigation has been required. Only ⅓ of the additional mitigation required for the project may be non-wetland vegetated buffers. The vegetated buffer requirement for the NWPs is not contrary to the 1990 mitigation MOA, because vegetated buffers next to open waters help achieve the goals of the Clean Water Act. It is also important to note that the 1990 mitigation MOA applies only to activities subject to the standard permit process.

One commenter requested clarification as to where vegetated buffers must be located. A few commenters disagree with the Corps position that vegetated buffers adjacent to waters of the United States provide benefits for the aquatic environment. One commenter requested that the Corps explain why vegetated buffers are necessary and specify the goals that will be accomplished by vegetated buffers. This commenter said that the goals of vegetated buffers will affect width requirements. This commenter also believes that not all areas adjacent to open waters provide significant benefits to water quality and that all vegetated buffers do not perform all 10 functions listed on page 39274 of the July 21, 1999, **Federal Register** notice, because the functions of vegetation buffers are dependent on the vegetation present and site and soil characteristics.

For the purposes of the NWPs, vegetated buffers are to be established and maintained on uplands or wetlands next to perennial and intermittent streams and other open waters. The functions and values of vegetated buffers next to open waters, especially forested riparian zones next to streams, are well documented in the scientific literature. The main goal of the vegetated buffer requirement is to restore, enhance, and protect open waters. In general, properly designed and implemented vegetated buffers, especially those inhabited by trees, will perform the functions listed above. Since we are not requiring vegetated buffers next to ephemeral streams, most vegetated buffers should have adequate amounts of water to naturally establish and support trees in the riparian zone. Vegetated buffers will normally be 25 to 50 feet wide on both sides of streams, but the district engineer can require wider vegetated buffers to address documented water quality concerns. A 25 to 50 foot wide vegetated buffer next to a stream provides important aquatic habitat functions and values, as well as substantial water quality benefits.

Many commenters believe that the vegetated buffer requirements for the new and modified NWPs exceed the Corps regulatory authority. Several commenters consider the vegetated buffer requirement as an attempt to expand the scope of the Corps jurisdiction to uplands. Numerous commenters indicated that the Corps is requiring vegetated buffers even if the work does not involve discharges of dredged or fill material into waters of the United States. Many commenters said that any vegetated buffer requirements should be imposed by the states, who have authority under Section 401 of the Clean Water Act to address water quality issues. Several commenters said that vegetated buffers could also be imposed by states through the requirements of the National Pollutant Discharge Elimination System program.

The Corps has the statutory authority to require vegetated buffers next to streams and other open waters because the goal of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of Nation's waters. This goal is stated in Section 101 of the Clean Water Act and is applicable to all sections of the Clean Water Act, including section 404. Vegetated buffers next to streams and other open waters help maintain the chemical, physical, and biological integrity of these waters. The establishment and maintenance of vegetated buffers next to streams is the

restoration of riparian zones. Discharges of dredged or fill material into waters of the United States, which the Corps regulates under section 404 of the Clean Water Act, result in the loss of aquatic resource functions and values. The establishment and maintenance of vegetated buffers next to streams and other open waters offsets losses of aquatic resource functions and values and reduces degradation of these aquatic resources.

The vegetated buffer requirement is not an attempt to expand the Corps regulatory jurisdiction. We are not asserting jurisdiction over uplands next to streams and other open waters. We cannot require compensatory mitigation for upland impacts, but we can require, as compensatory mitigation, upland vegetated buffers that restore or protect aquatic habitat and water quality. The establishment or maintenance of a vegetated buffer next to waters of the United States can be an important part of the compensatory mitigation required for a Corps permit. The establishment and maintenance of vegetated buffers next to open waters can be considered as compensatory mitigation that offsets losses of waters of the United States and ensures that the adverse effects of the authorized work on the aquatic environment are minimal. Vegetated buffers are not normally required for activities that do not involve discharges of dredged or fill material into waters of the United States. For example, vegetated buffers are not required for structures in navigable waters of the United States, unless the district engineer determines that such compensatory mitigation is necessary to offset impacts to those waters.

Vegetated buffers next to streams and other open waters do more than protect water quality. Eight of the 10 functions listed in the July 21, 1999, **Federal Register** notice relate to aquatic habitat. Only two functions listed in that notice exclusively addressed water quality functions. Likewise, most of the functions of vegetated buffers listed in this **Federal Register** notice are aquatic habitat functions. Commenters objecting to the vegetated buffer requirement focused only on the water quality functions of vegetated buffers, and ignored the aquatic habitat functions.

A number of commenters stated that the vegetated buffer requirement duplicates, and may conflict with, local land use planning. Two commenters said that the vegetated buffer requirement is contrary to 33 CFR 320.4(j)(2), which states that the primary responsibility for zoning lies with state, local and Tribal governments. Many commenters believe that the vegetated buffer requirement constitutes a taking of private property. Two commenters said that the vegetated buffer requirement has the potential to result in a taking of private property because the Corps has failed to demonstrate the causal link between the vegetated buffer requirement and specific water quality concerns caused by discharges of dredged or fill material into waters of the United States authorized by the NWPs. These commenters assert that the Corps must allow alternative methods to address water quality concerns.

The vegetated buffer requirement does not duplicate or conflict with local land use planning. Although some state and local governments have vegetated buffer requirements, there are many regions that do not have such requirements. The district engineer will consider state and local vegetated buffer requirements when determining the vegetated buffer requirements for NWP activities. If the state or local vegetated buffer requirements are adequate, then the district engineer can defer to those requirements. The vegetated buffer requirement is not contrary to 33 CFR 320.4(j)(2) because it does not override state or local zoning decisions. If it is impractical for the permittee to establish and maintain vegetated buffers next to open waters on the project site, then vegetated buffers are not required. If the project proponent does not want to establish and maintain vegetated buffers and the district engineer determines that such buffers are necessary to ensure the proposed work results in minimal adverse effects on the aquatic environment, then the project proponent can request an individual permit or other form of DA permit.

The vegetated buffer requirement does not constitute a taking of private property because it is compensatory mitigation to offset losses of aquatic resource functions and values. If the project proponent does not want to establish and maintain vegetated buffers next to open waters on the project site, then he or she can request another form of DA permit to authorize the activity. The removal of nutrients, sediments, and pollutants from surface and shallow subsurface waters by vegetated buffers next to open waters is well documented in the scientific literature. The establishment and maintenance of vegetated buffers is a type of out-of-kind compensatory mitigation to offset authorized losses of wetlands and other waters of the United States, which also remove these chemical compounds from waters. The vegetated buffer requirement is no different than requiring the alteration of uplands to create wetlands as compensatory mitigation for losses of wetlands. In fact, the establishment and maintenance of vegetated buffers next to streams and other open waters is likely to be more successful and less costly than attempting to create wetlands by grading and altering uplands. When reviewing compensatory mitigation proposals, district engineers can consider alternative forms of compensatory mitigation to address water quality concerns, if vegetated buffers are not practical for the project site.

Several commenters opposed the vegetated buffer requirement, stating that it substantially reduces the amount of developable area on a parcel of land. Two commenters said that the vegetated buffer requirement will be difficult to implement for those projects that have already received subdivision approval. These commenters also assert that this requirement will increase the cost of housing. Several commenters said that the establishment and maintenance of vegetated buffers is practical only in large, open spaces. One commenter stated that the vegetated buffer requirement will increase sprawl development because it requires buildings to be constructed farther apart from each other.

Although the vegetated buffer requirement may reduce the amount of developable land on a particular parcel, we do not agree that such a reduction will be substantial. In most situations, vegetated buffers will be located in 100-year floodplains, in which there are often state or local building restrictions. If it is impractical for the project proponent to establish and maintain vegetated buffers on the property because of prior subdivision approval, then the district engineer can determine that vegetated buffers are not required. We do not agree that the vegetated buffer requirement will increase the cost of housing more than any other type of compensatory mitigation requirement, such as the creation of wetlands. In most circumstances, establishing and maintaining vegetated buffers will be less costly than grading land to create wetlands. The vegetated buffer requirement will not encourage sprawl development.

One commenter believes that the Corps needs to provide a cost-benefit analysis for the vegetated buffer requirement. This commenter also stated that this requirement requires an environmental impact statement because it is a major Federal action.

The vegetated buffer requirement does not need a cost-benefit analysis or an environmental impact statement.

In the July 21, 1999, **Federal Register** notice, we stated that vegetated buffers

will normally be 50 to 125 feet wide, but provided district engineers with the flexibility to impose narrower or wider vegetated buffers. Many commenters stated that the widths of vegetated buffers required for NWP activities should be based on the width necessary to ensure that the adverse effects to the aquatic environment are minimal. These commenters said that permit conditions, including mitigation requirements, must be directly related to impacts of the proposed work and appropriate to scope and degree of those impacts. One of these commenters cited 33 CFR 325.4(a). Another commenter cited 33 CFR 320.4(r) and remarked that the Corps has not demonstrated that vegetated buffers provide compensatory mitigation for identifiable losses of resources. Numerous commenters said that the requirement for 50 to 125 foot wide vegetated buffers would, in some cases, result in compensatory mitigation requirements that would exceed the impacts of the activity. Two commenters disapprove of the vegetated buffer requirement, stating that it is not tailored to the effects of the authorized activity and could result in large vegetated buffers for projects that result in small losses of waters of the United States. Several commenters said that vegetated buffer requirements for particular projects must be in proportion of the impacts of the authorized work.

After considering these comments, we have reduced the recommended width of vegetated buffers to 25 to 50 feet wide on both sides of the stream or 25 to 50 feet from the OHWM or bank of the open waterbody. District engineers can require wider vegetated buffers if there are documented water quality concerns. The width of the vegetated buffer is measured in a direction perpendicular to the OHWM or bank of the open waterbody. The 25 to 50 foot wide vegetated buffer will provide aquatic habitat functions and values, as well as water quality benefits. When determining the appropriate width of vegetated buffers, district engineers will consider the degree of the adverse effects on the aquatic environment caused by the authorized work and require compensatory mitigation to the extent necessary to ensure that the adverse effects are minimal. The required compensatory mitigation, including vegetated buffers, will be in proportion, from an aquatic function and value perspective, to the authorized impacts to waters of the United States. If the authorized work results in minimal adverse effects on the aquatic environment without compensatory mitigation, then vegetated buffers are not required.

Two commenters said that the Corps should not specify a minimum width for vegetated buffers. One of these commenters contends that the benefits of vegetated buffers is likely to be different for dissimilar types of wetlands and waterbodies. One commenter requested clarification concerning the criteria that will be used to determine the width of vegetated buffers for specific project sites and which plant species should be used to establish the vegetated buffer. One commenter asked if a 50 to 125 foot wide vegetated buffer will be required in all cases. Two commenters recommended a minimum vegetated buffer width of 100 feet.

One commenter stated that many factors are cited in the current literature for determining the appropriate width of vegetated buffers. This commenter said that the Corps needs a standard method that district engineers can use to determine appropriate, site-specific vegetated buffer widths. This commenter also indicated that the width of the vegetated buffer should be based on the value of the aquatic resource to be protected and adjacent land uses. In addition, the method should identify situations where vegetated buffers are inappropriate or impractical. Several commenters said that the Corps should use a more flexible approach for vegetated buffer requirements, including the consideration of other methods that provide the same benefits, while utilizing less land. One commenter suggested methods to provide flexibility for vegetated buffer requirements, including buffer averaging to allow certain buffer areas to be narrower as long as the average width meets minimum requirements, conservation easements that can be donated to responsible charitable trusts and owner tax benefits, and density trading which allows developers density credits to offset loss of useable land to buffers.

We believe that recommending a 25 to 50 foot wide vegetated buffer and allowing district engineers the flexibility to determine appropriate vegetated buffer widths on a case-by-case basis is appropriate. A 25 to 50 foot wide vegetated buffer next to open waters will protect or restore aquatic habitat functions and values and provide water quality benefits. District engineers can require wider vegetated buffers if there are documented water quality concerns that can be addressed by a wider vegetated buffer. The district engineer will determine the appropriate width of the vegetated buffer on a case-by-case basis, based on the degree of impacts and the quality of waters. District engineers will also assess, on a case-by-case basis, whether or not vegetated buffers are impractical or inappropriate. District engineers can also consider the use of buffer width averaging. Density trading is more appropriately addressed by local planning and zoning agencies.

One commenter suggested using vegetated buffer width guidelines published by NRCS, which are based on soil type, slope, and topography. Two commenters stated that appropriate vegetated buffer widths should be determined by district engineers after consultation with Federal and state resource agencies. Two commenters requested that the Corps provide guidance for determining the length of the vegetated buffer along the open waterbody (i.e., how far upstream and downstream the vegetated buffer should extend).

We do not agree that it is necessary, for the purposes of the NWPs, to utilize complex vegetated buffer width guidelines based on soil types, slopes, and topography. Vegetated buffers 25 to 50 feet wide provide substantial aquatic habitat functions and water quality benefits. District engineers can require wider vegetated buffers to address documented water quality concerns or narrower vegetated buffers where it is not practicable to require 25 foot wide buffers. District engineers can coordinate with Federal and state resource agencies to determine the appropriate vegetated buffer width for a particular project, but we do not believe that this is necessary in all cases. The length of the vegetated buffer should extend along the open waterbody to the extent the district engineer determines necessary to offset authorized impacts.

Several commenters indicated that the guidance in the July 21, 1999, **Federal Register** notice concerning the width of vegetated buffers contradictory. For instance, General Condition 9 states that vegetated buffers must be established to the maximum extent practicable but there is a statement on page 39339 that says that the vegetated buffer should be as wide as possible. In addition, on page 39274 there is a statement that the width of the vegetated buffer must balance the benefits to environment with the uses of property resulting from authorized work. These commenters believe that the width of the vegetated buffer should be based on the benefits of the buffer and the adverse effects of the regulated activity (i.e., the discharge of dredged or fill material into waters of the United States), not all uses of the project.

We do not agree that the discussion of vegetated buffer requirements in the July 21, 1999, **Federal Register** notice contains contradictions. The appropriate width of a vegetated buffer is dependent on what is practicable for the prospective permittee and the amount of vegetated buffer that is necessary to ensure that the activity results in minimal adverse effects to the aquatic environment.

Several commenters said that vegetated buffers should not be required in all cases, particularly in those situations where the adverse effects on the aquatic environment are minimal. One commenter asked if vegetated buffers are required for activities that do not require notification to the district engineer. Another commenter asked if vegetated buffers are required even if the proposed work does not result in any impacts to streams, open waters, or wetlands on the project site. One commenter stated that vegetated buffers should be required only if there are perennial or intermittent streams on the site. Two commenters asserted that vegetated buffers should not be required next to ephemeral streams. One commenter stated that flexibility for district engineers to determine vegetated buffer widths reduces predictability for the regulated public when planning developments. Two commenters recommended that joint Federal agency guidance be developed for vegetated buffer requirements.

Vegetated buffers are not required if the proposed work results in minimal adverse effects on the aquatic environment without compensatory mitigation. Vegetated buffers are only required where the proposed project requires a Corps permit. The Corps is not establishing any new authority to regulate riparian areas, where no Corps permit is otherwise required. Vegetated buffers are not required for activities that do not require notification, since these activities result in minimal adverse effects on the aquatic environment. Vegetated buffers are required if there are open waters on the project site. We agree that vegetated buffers should not be required next to ephemeral streams. We will consider the development of joint guidance for vegetated buffer requirements.

Two commenters objected to requirements for conservation easements or deed restrictions for vegetated buffers. Another commenter supported the requirement for conservation easements or deed restrictions.

As with other forms of compensatory mitigation, conservation easements or deed restrictions for vegetated buffers are necessary to ensure that the compensatory mitigation site is maintained and protected from future alteration.

Three commenters requested clarification concerning how vegetated buffers are to be maintained and for how long vegetated buffers must be maintained. Two commenters stated that the requirement to maintain vegetated buffers is too burdensome for permittees because it implies that the permittees would have to monitor vegetated buffers and replace any vegetation that dies or is damaged during a flood or other storm event. One commenter indicated that the maintenance of vegetated buffers is problematic in arid regions because water would have to be provided to the plants to ensure their survival, which would be costly and contrary to water conservation policies. Two commenters suggested a limit of one year for the maintenance of vegetated buffers.

Permittees are not required to establish and maintain vegetated buffers that would require active management, such as irrigation. If the vegetated buffer must be planted, it must be self-sustaining, without the need for maintenance. Trees and shrubs damaged by storms and other events do not need to be replaced because the vegetation will grow back at the buffer site.

Two commenters supported the requirement for native species in vegetated buffers. Several commenters objected to requiring native species in vegetated buffers. One commenter said that this requirement is contrary to current best management practices because certain non-invasive, non-native plant species may be preferable in certain circumstances. Two commenters stated that the requirement for native species is unnecessary because there is no connection between water quality and the planting of native species or the removal of noxious weeds. Two commenters indicated that the requirement for native trees and shrubs in vegetated buffers is too strict and permittees should be able to plant native grasses and other herbaceous species instead of trees and shrubs. One commenter requested a list of ''acceptable'' native plant species for vegetated buffers.

Permittees are encouraged to plant vegetated buffers with native species, but this is not an absolute requirement. Vegetated buffers should be planted with native species, but a well-established vegetated buffer that contains some non-native species should not be removed and replaced. We recognize that there are circumstances where non-native species may be more appropriate. The planting of native species is important for the habitat functions of vegetated buffers. We encourage permittees to plant seedlings and saplings of trees in the vegetated buffer, but permittees can plant herbaceous vegetation in the vegetated buffer and allow natural succession processes to allow a woody plant community to develop at a later time. We do not agree that it is necessary to provide a list of ''acceptable'' native species that should be planted in vegetated buffers.

One commenter requested clarification whether vegetated buffers must be grassed or wooded. Another commenter objected to wooded vegetated buffers because they would impede flood flows and increase erosion. One commenter stated that wooded vegetated buffers would cause a loss of hydraulic capacity of the channel.

Vegetated buffers should have woody vegetation because woody plants, especially trees, are important components of an effective vegetated buffer. Woody plants, especially trees, provide shade to the open waters, as well as substantial amounts of detritus that is an important component of aquatic food webs. Woody vegetation in riparian zones often slows the velocity of floodwaters, which can provide water quality benefits by allowing sediment to drop out of suspension and decrease the sediment load in the water column. We do not agree that vegetated buffers increase erosion. The roots of woody vegetation help stabilize the soil, thereby decreasing erosion. Although woody vegetation, especially tree falls that create snags, may reduce the hydraulic capacity of a stream channel, it is important to consider the ecological functions and values of the stream, not just the hydraulic capacity of the stream channel and water conveyance. With the new and modified NWPs, we are placing greater emphasis on protecting open waters, especially streams.

One commenter supported the Corps statement in the July 21, 1999, **Federal Register** notice that mowed lawns are not considered vegetated buffers. Several commenters objected to this statement and believe that mowed lawns should be considered vegetated buffers.

We do not consider mowed lawns next to streams and other open waters as vegetated buffers because mowed lawns do not provide most of the functions and values that a vegetated buffer inhabited by trees or shrubs would provide. For example, mowed lawns cannot shade streams to moderate water temperature changes or produce

woody debris that creates important aquatic habitat. In many areas, mowed lawns are intensively managed through the application of fertilizers, herbicides, and pesticides. Intensively managed mowed lawns next to streams can exacerbate water quality problems that vegetated buffers are intended to address. Since mowed lawns next to streams and other open waters do not provide the functions and values that wooded vegetated buffers provide, it would be inappropriate to consider mowed lawns next to streams and other open waters as compensatory mitigation for activities authorized by NWPs.

One commenter said that the requirement for vegetated buffers is inconsistent with the proposed NWP definitions. For example, the definition for the term ''compensatory mitigation'' does not include vegetated buffers that are established and maintained on uplands next to streams and other open waters. This commenter also contends that vegetated buffers cannot be considered enhancement because the proposed NWP definition for this term is limited to activities in aquatic habitats that increase one or more aquatic functions.

The establishment and maintenance of vegetated buffers next to streams and other open waters as compensatory mitigation is not inconsistent with the definition of the term ''compensatory mitigation'' provided in the ''Definitions'' section of the NWPs. The planting of trees and shrubs next to a stream in a pasture enhances the quality of the stream. Stream restoration activities usually involve planting the upland or wetland riparian zone with trees and shrubs. We have added a definition of the term ''vegetated buffer'' in the ''Definitions'' section of the NWPs.

One commenter requested that the Corps provide guidance concerning the specific amount of vegetated buffer that will be required as compensatory mitigation to offset losses of waters of the United States. Two commenters stated that vegetated buffers should be an additional requirement after the permittee has provided full compensation for wetland losses. A commenter asked if vegetated buffers alone can be used to satisfy compensatory mitigation requirements for the NWPs. This commenter also stated that, in many cases, vegetated buffers already exist on site and that the preservation of these areas is strongly discouraged by Corps mitigation policy because of the ''no net loss'' goal. This commenter believes that the vegetated buffer requirement is contrary to Corps mitigation policy.

We have modified General Condition 19 to provide guidance regarding the proportion of compensatory mitigation that should consist of vegetated buffers. If there are open waters on the project site and the district engineer requires compensatory mitigation for wetland impacts to ensure that the net adverse effects on the aquatic environment are minimal, any vegetated buffer will comprise a portion or all of the remaining compensatory mitigation acreage after the permanently filled wetlands have been replaced at a one-to-one acreage basis. By using vegetated buffers as compensatory mitigation, the quality of open waters will be protected or enhanced by maintaining these vegetated areas if they already exist on the site. If the vegetated buffer is not used as compensatory mitigation, then the permittee could cut down the existing vegetation next to the open waters (which often does not require a DA permit), which would adversely affect the quality of the open waters. Programmatically, the Corps will continue to support the ''no net loss'' goal for wetlands, but the establishment and maintenance of vegetated buffers for NWP activities will provide substantial benefits for open waters, especially streams.

Many commenters stated that the vegetated buffer requirement is problematic for companies and agencies that do not own the property where the vegetated buffer would be located on the project site. For example, the authority of flood control agencies is often limited to the channel, not to the land adjacent to the channel. As another example, utility companies have limited easement rights in utility line rights-of-way and cannot impose deed restrictions or conservation easements in these areas. Numerous commenters said that vegetated buffers should not be required where the project proponent does not own the land next to the open waters on the project site. Several commenters stated that the costs for public agencies to obtain rights-of-way to establish and maintain vegetative buffers will be prohibitive or economically impractical.

District engineers will not normally require vegetated buffers next to streams and other open waters if the permittee does not own the land next to the open waterbody. Such vegetated buffers will only be required where the permittee has or can reasonably obtain the appropriate conservation easements. Likewise, vegetated buffers are not required in utility line easements. However, if the utility company is building a substation on its land and there are open waters on the project site, the district engineer can require vegetated buffers next to those open waters as compensatory mitigation.

Two commenters said that vegetated buffers are impractical in urban areas where most of the surface runoff is directed to storm drain pipes, not streams. A commenter stated that maintaining vegetated buffers adjacent to facilities built by developers but handed over to local governments would increase costs to those local governments. Another commenter said that the vegetated buffer requirement will increase project and maintenance costs for state Department of Transportation projects. Two commenters assert that the vegetated buffer requirement will make maintenance of authorized facilities difficult or prohibitive. One commenter requested clarification whether a vegetated buffer disturbed during a maintenance activity will require additional mitigation or whether the project proponent would be required only to replace the disturbed vegetation.

If it is impractical to establish and maintain vegetated buffers next to streams in urban areas because of the limited amount of available land, then vegetated buffers are not required. In these circumstances, off-site compensatory mitigation may be preferable, including off-site vegetated buffers. If vegetated buffers next to open waters would make the maintenance of facilities in waters of the United States too costly, then other forms of compensatory mitigation should be considered. We do not agree that the vegetated buffer requirement would increase costs for transportation projects, because these activities usually require compensatory mitigation. If it is necessary to disturb the vegetated buffer during maintenance activities, the project proponent is only required to allow the vegetation to grow back. Additional compensatory mitigation will not be required for the disturbance of a vegetated buffer if it is allowed to grow back.

Several commenters said that vegetated buffers should not be required for activities authorized by NWPs 3 or 12. One commenter indicated that vegetated buffers should not be required for linear transportation crossings that are constructed perpendicular to the stream. Another commenter said that vegetated buffers should not be required for flood control maintenance activities.

District engineers can require vegetated buffers for activities that involve discharges of dredged or fill material into waters of the United States if there are open waters on the project site. Activities authorized by NWP 3 typically do not require compensatory

mitigation, including vegetated buffers. There may be circumstances where vegetated buffers will be required for utility line activities, if compensatory mitigation is necessary to ensure that the adverse effects on the aquatic environment are minimal. Activities authorized by NWP 31 usually would not require vegetated buffers, especially if the flood control authority does not own the land next to the flood control facility or compensatory mitigation was required for the construction of the facility or previous maintenance activities.

Regional Conditioning

One commenter supported the Corps increased emphasis on regional conditioning to ensure that the new and modified NWPs authorize only those activities that result in minimal adverse effects on the aquatic environment. Numerous commenters objected to imposing regional conditions on the new and modified NWPs and stated that the Corps should rely on case-specific special conditions instead of regional conditions. Several commenters said that regional conditioning of the NWPs is unnecessary and contrary to the purpose of the NWPs, which is to authorize activities that have minimal adverse effects. Two commenters suggested that the Corps impose more stringent national terms and conditions on the NWPs instead of relying on regional conditions. One commenter indicated that the Corps reliance on regional conditions for the new and modified NWPs demonstrates that these NWPs authorize activities with more than minimal adverse effects. Two commenters said that regional conditions do not provide adequate protection for wetlands.

We do not agree that only case-specific special conditions should be added to NWPs. Regional conditions are more effective at ensuring that NWPs authorize only those activities with minimal adverse effects on the aquatic environment, individually and cumulatively. Regional conditions also benefit the regulated public by providing them with advance notice of additional NWP restrictions and promoting consistency in the implementation of the NWP program. Regional conditions are necessary because aquatic resource functions and values vary considerably across the country. Utilization of regional conditions is not contrary to the NWP program because those conditions help ensure that the NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment.

Imposing more stringent national terms and limitations on the NWPs instead of imposing regional conditions would not be a practical alternative, because it would severely limit the ability of the NWPs to authorize many activities that have minimal adverse effects on the aquatic environment. It is far more efficient to develop NWPs that authorize most activities that have minimal adverse effects on the aquatic environment and allow division and district engineers to limit the use of these NWPs or exercise discretionary authority in specific situations that may result in more than minimal adverse effects on the aquatic environment. For particular regions of the country or specific waterbodies where additional safeguards are necessary to ensure that the NWPs authorize only those activities with minimal adverse effects, regional conditions are the appropriate mechanism. Case-specific discretionary authority or special conditions cannot substitute for regional conditions in many cases, especially for those NWP activities that do not require notification to the District Engineer. For example, regional conditions can lower PCN thresholds for activities in high value waters to allow district engineers to review those activities and determine if the work can be authorized by NWPs. Division and district engineers are much more knowledgeable about local aquatic resource functions and values and can prohibit or limit the use of the NWPs in high value waters. We contend that regional conditioning of the NWPs provides effective protection for high value wetlands and other aquatic habitats.

Several commenters indicated that regional conditions should be more consistent between Corps districts. One of these commenters also stated that regional conditions should be based on environmental factors and climate, not political boundaries. One commenter recommended Corps division boundaries as the smallest unit for consistency in regional conditions. Another commenter suggested state boundaries as the smallest unit for consistency of regional conditions. Several commenters said that regional conditions make it more difficult for companies that work in more than one state to efficiently manage their operations to comply with the NWPs.

To a certain extent, regional conditions are based on environmental factors but it is usually necessary to provide some consistency within political boundaries, such as state boundaries. Consistency within a particular state is beneficial to the regulated public because it results in more effective cooperation between state agencies, such as the state agencies responsible for making Section 401 and CZMA determinations, and the Corps. In those states where more than one Corps district is present, we have recommended that those Corps districts develop, to the extent practicable, consistent regional conditions statewide. However, we recognize that there may be certain regions within a state, such as specific high value waterbodies, that may warrant regional conditions that are not necessary in other areas of that state. Different regional conditions can be imposed in those unique situations. Within Corps division boundaries, there is often wide variability in aquatic resource functions and values. Therefore, consistency in regional conditions at a scale larger than a state is contrary to the purpose of the regional conditioning process, which is to consider local differences in aquatic resource functions and values to ensure that the NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment. Companies that work in more than one Corps district or more than one state will have to comply with the regional conditions established in each district or within each state.

One commenter stated that the Corps assertion that regional conditions cannot be elevated to headquarters is inconsistent with the regional conditioning process established in the July 1, 1998, **Federal Register** notice. Three commenters indicated that division engineers should be able to increase the acreage limit of an NWP or delete or modify conditions of an NWP through regional conditions and recommended that the Corps revise its regulations to provide division engineers with such authority.

The authority to require regional conditions lies solely with division engineers and cannot be elevated to the Headquarters level. The regulations for the NWPs (33 CFR Part 330) clearly state that the modification, suspension, or revocation of any NWP on a regional basis is the decision of the division engineer. The regional conditioning process described in the July 1, 1998, **Federal Register** notice did not include elevation of NWP regional conditions to headquarters. Meetings between Corps district commanders and Regional Administrators of EPA and Regional Directors of the U.S. Fish and Wildlife Service and National Marine Fisheries Service were to occur to discuss proposed regional conditions and resolve any disputes concerning those regional conditions (see 63 FR 36048).

As discussed in the July 21, 1999, **Federal Register** notice, division and district engineers cannot use regional conditioning to make the NWPs less restrictive. Only the Chief of Engineers can modify an NWP to make it less restrictive, if it is in the national public interest to do so. Such a modification must go through a public notice and comment process. However, if a Corps district determines that regional general permits (RGPs) are necessary for activities not authorized by NWPs, then that district can develop and implement regional general permits to authorize those activities, as long as those regional general permits comply with Section 404(e) of the Clean Water Act. However, we have established a six month moratorium on RGPs and LOPs that are germane to the new and modified NWPs to allow districts time to assess the true need for such RGPs and LOPs.

One commenter stated that the regional conditioning process violates the Administrative Procedures Act and that proposed regional conditions must be published in the **Federal Register** for comment. This commenter said that posting draft regional conditions on Internet home pages provides inadequate notice because most citizens do not use the Internet. This commenter also requested that the Corps publish a notice in the **Federal Register** that includes all proposed regional conditions to solicit public comments on those regional conditions. Several commenters objected to the regional conditioning process because all draft regional conditions were not available when the July 21, 1999, **Federal Register** notice was published. Two commenters said that regional conditions should not be drafted or subject to comment until the new and modified NWPs are issued.

Regional conditions for the NWPs do not need to be published in the **Federal Register** for public comment. It is important to remember that regional conditions are issued by division commanders, not Corps headquarters. District public notices for regional conditions provide adequate opportunities for public comment. Since the proposed regional conditions do not affect the process for issuing the new and modified NWPs, we do not agree that it was necessary to have all draft regional conditions posted on district Internet home pages at the same time the July 21, 1999, **Federal Register** notice was published. The 75-day comment period provided adequate opportunities for the public to consider both the July 21, 1999, **Federal Register** notice and all draft regional conditions proposed by Corps districts.

One commenter stated that it is difficult for prospective permittees to determine in which district their activities would occur and recommended that the Corps make maps of district boundaries available. One commenter suggested that high value waters subject to regional conditioning include warm water fisheries and waters with benthic macroinvertebrates.

The Corps has a general map of Corps division and district boundaries that is available on the Internet at http://www.usace.army.mil/inet/locations/bdry-pages/. This interactive map also provides links to Corps district home pages. Due to the scale of this map and since most Corps district boundaries are based on watershed boundaries, prospective permittees should contact the nearest Corps district office to determine which Corps district will review their PCN or permit application. Division engineers can determine that waters of the United States supporting warm water fisheries or benthic macroinvertebrates are high value waters that should be subject to regional conditioning.

Essential Fish Habitat

For the proposed new and modified NWPs published in the July 21, 1999, **Federal Register** notice, we conducted programmatic Essential Fish Habitat (EFH) consultation with the National Marine Fisheries Service (NMFS), pursuant to Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act. In response to our request for programmatic consultation, NMFS made two programmatic EFH conservation recommendations. The first EFH conservation recommendation was for Corps districts to work with NMFS regional offices to the extent necessary to develop NWP regional conditions that conserve EFH and are consistent with NMFS regional EFH conservation recommendations. The second EFH conservation recommendation indicated that paragraph (e) of General Condition 13, which states that district engineers will provide no responses to resource agency comments on PCNs, should not apply to EFH conservation recommendations provided by NMFS.

We concur with both of these EFH conservation recommendations. We have directed our district offices in geographic regions with EFH to coordinate with NMFS regional offices to develop, to the extent necessary, regional conditions for the new and modified NWPs that conserve EFH and are consistent with NMFS regional EFH conservation recommendations. In addition, we have added a sentence to paragraph (e) of General Condition 13 to require district engineers to respond to NMFS within 30 days of receipt of any EFH conservation recommendations. This requirement is necessary to comply with section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

Workload Implications of the New and Modified Nationwide Permits

A large number of commenters stated that the lower acreage limits and PCN requirements of the new and modified NWPs, as well as the three proposed general conditions, will result in substantial increases in the number of standard permit applications processed by the Corps and processing times for all Section 404 permits. Many commenters objected to the proposed NWPs because the Corps did not explain how it will handle the increase in workload. A number of commenters said that if the proposed changes to the NWP program are implemented, the Corps will need to increase its resources to process the additional standard applications and PCNs in a timely manner. One commenter said that the cumulative impact analysis requirements will increase the Corps workload while another commenter cited regional conditions as another factor that will increase the Corps workload.

One commenter predicted that the Corps will experience an increase of 17,000 individual permit applications per year. Another commenter estimated an increase of 2,000 individual permits per year as a result of the proposed changes. This commenter also predicted that average individual permit processing times will increase from 89 days to 350 days over the next six years and estimates that the permit application carryover will double during that time period.

The workload and compliance costs study conducted by IWR, and mentioned above in the overview, for the proposal published in the July 21, 1999, **Federal Register** showed that the proposed NWP package would result in a 50% increase in the number of standard individual permit applications received by the Corps per year. The study estimated that the Corps would receive 4,429 additional standard permit applications per year and receive 2,878 fewer NWP PCNs per year. As a result of the increased standard permit workload, the average amount of time that it takes for the Corps to process permit applications would increase three to four times within five years. Likewise, the permit application

backlog would increase by the same amount during that five year period.

The changes to the new and modified NWP issued today, including the ½ acre limit and the modification of the general condition for fills in 100-year floodplains, are estimated to result in 40% fewer standard permit applications compared to the proposal published in the July 21, 1999, **Federal Register**. Also, the standard permit processing times and the permit application backlog would increase by one and a half to two times the amount for FY 1998.

We have also reviewed an analysis, based on the July 21, 1999, proposal, that was conducted on behalf of the National Association of Counties. This analysis examined the impacts of the July 21, 1999, proposal on the Corps workload and costs to the Corps and the regulated public.

We have not proposed any changes to our approach for analyzing cumulative adverse effects on the aquatic environment cause by NWPs. Therefore, cumulative adverse effect analysis will not impose additional workload on Corps district offices. Although regional conditions will cause some increases in the Corps workload, those increases are manageable and necessary to ensure that the NWPs do not authorize activities that result in more than minimal adverse effects on the aquatic environment.

One commenter said that the increases in workload caused by the three proposed general conditions are offset by the increased scope of applicable waters for these NWPs, because many of these activities would have required individual permits when NWP 26 was in place. In contrast, another commenter stated that the proposed NWPs will result in more individual permit applications because the new NWPs do not authorize activities in tidal waters.

We do not agree that the larger geographic scope of the new NWPs, when compared to the geographic scope of NWP 26, will offset the increase in workload caused by the new NWP general conditions. For example, General Condition 26 prohibits discharges of dredged or fill material into waters of the United States within 100-year floodplains of stream segments below headwaters. Since NWP 26 did not authorize discharges of dredged or fill material into tidal waters, prohibiting the use of the new NWPs in tidal waters will not cause any increases in the number of individual permit applications processed by the Corps.

Other Issues

In response to the July 21, 1999, **Federal Register** notice, some commenters raised additional issues related to the new and modified NWPs. Several commenters expressed concern that none of the new and modified NWPs authorize oil and gas development facilities. These commenters said that NWP 26 was used to authorize these facilities where no regional general permits (RGPs) are available and recommended that the Corps develop such an NWP. One commenter suggested that the Corps modify NWP 39 to authorize oil and gas wells as industrial facilities.

When we developed the new and modified NWPs that will replace NWP 26, we considered an NWP to authorize oil and gas facilities. However, when we surveyed Corps districts to determine how frequently such an NWP would be used, we found that there was little need for this NWP because most of the districts that frequently authorize oil and gas facilities have issued RGPs to authorize these activities. The development of RGPs for this activity is more appropriate than developing a new NWP. We do not agree with the recommendation to modify NWP 39 to authorize these activities, because NWP 39 authorizes building pads and attendant features, and oil and gas wells are not buildings.

Two commenters recommended that the Corps develop an NWP to authorize the construction of fish passage facilities and other stream enhancement activities, such as relocating a portion of a stream channel to provide proper alignment for fish passage, because these activities were authorized by NWP 26.

We do not agree that there is sufficient need to develop a new NWP to authorize the construction of fish passage facilities. Stream enhancement activities may be authorized by NWP 27, provided the proposed work meets the terms and conditions of this NWP. Discharges into waters of the United States associated with the construction of fish passage facilities may also be authorized by other NWPs, RGPs, or individual permits.

Several commenters requested that the Corps reverse its decision to withdraw NWP B, which was proposed in the July 1, 1998, **Federal Register** notice to authorize master planned development activities. One of these commenters stated that the withdrawal of proposed NWP B is contrary to ''smart growth'' initiatives.

Our decision to withdraw NWP B is discussed in the October 14, 1998, and July 21, 1999, **Federal Register** notices. We have not changed our position on this matter, but we could propose an NWP for master planned development activities at a later time. We do not agree that the withdrawal of NWP B is contrary to smart growth initiatives, because developments that are part of smart growth planning efforts can be authorized by other NWPs, such as NWP 39, RGPs, and individual permits.

One commenter objected to the draft NWPs, stating that they do not authorize certain activities associated with railroad operations, such as the completion of drainage improvements along unstable embankments, bank stabilization to protect tracks from slide events, small fills associated with the installation of signals and switches, and the construction of miscellaneous structures associated with railroad tracks.

Some of these activities can be authorized by existing NWPs, including some of the NWPs modified today. For example, bank stabilization activities to protect railroad tracks from slide events may be authorized by NWP 13. Small fills associated with the installation of signals, switches, and minor drainage improvements may be authorized by NWP 18. NWP 14 may also be used to authorize some activities associated with railroads, since railways are linear transportation projects. These activities can also be authorized by RGPs and individual permits, if they do not qualify for authorization under the NWP program.

Two commenters said that a new NWP should be developed to authorize the construction of flood control improvements, including structures and fills for flood control facilities. Two commenters stated that the new and modified NWPs and regional conditions will make it more difficult to maintain a previously authorized flood-control facility.

We do not agree that a new NWP should be developed for the construction of flood control facilities. Such activities are likely to result in more than minimal adverse effects on the aquatic environment by reducing or eliminating the natural functions and values of open waters, including streams, and floodplains. Flood control activities may be authorized by NWPs, RGPs, or individual permits. The new and modified NWPs will not make it more difficult to maintain flood control facilities. We have withdrawn the proposed general condition for impaired waters. General Condition 26, Fills in 100-year Floodplains, does not apply to NWP 31, which authorizes the

maintenance of existing flood control facilities.

One commenter requested that the Corps develop a new NWP to authorize abandoned mined land cleanup activities, since NWP 27 does not authorize all of these activities. This commenter said that NWP 26 was used to authorize these activities.

During the reissuance process for the existing NWPs that will begin in 2001, we will consider developing an NWP to authorize discharges of dredged or fill material into waters of the United States for abandoned mined land cleanup projects.

One commenter recommended that the Corps revoke the NWPs in all watersheds or sub-basins that have exceeded 8% imperviousness. Another commenter suggested that the Corps condition the NWPs to encourage or require planting of native plant species in areas that are impacted by NWP activities, because such a condition would support Executive Order 13112, entitled ''Invasive Species.'' Two commenters said that the Corps should develop and implement a classification system that assesses the potential for restoring or enhancing degraded wetlands to encourage restoration or enhancement, instead of issuing permits to fill these areas.

We do not agree that the NWPs should be revoked simply because the amount of impervious surface within a particular watershed has exceeded a certain threshold. District engineers will monitor the use of the NWPs to ensure that the NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment, individually or cumulatively. We cannot require all permittees to plant native species at sites impacted by activities authorized by NWPs, but they are encouraged for vegetated buffers. While we encourage restoration and enhancement of degraded wetlands as compensatory mitigation for activities authorized by DA permits, including NWPs, we cannot develop a classification system to identify these areas and prohibit discharges of dredged or fill material into those waters.

Two commenters requested that the final notice announcing the issuance of the new and modified NWPs include a statement that the three new NWP conditions proposed in the July 21, 1999, **Federal Register** notice should not become conditions on all Corps permits, including individual permits. Two commenters said that any regional general permits or Section 404 letters of permission issued by Corps districts must include the three proposed new NWP general conditions.

We agree that the proposed general conditions limiting the use of NWPs in designated critical resource waters, impaired waters, and waters of the United States within 100-year floodplains should not be incorporated into all Corps permits. RGPs issued by Corps districts can authorize only activities that result in minimal adverse effects on the aquatic environment. Since RGPs are local solutions for implementing the Corps regulatory program, these general permits will thoroughly address local concerns for the aquatic environment. Therefore, it is not necessary for all RGPs issued by district engineers to contain conditions limiting their use in designated critical resource waters, impaired waters, and waters of the United States within 100-year floodplains. Standard permits are subject to the public interest review process, which considers impacts to public interest factors, including critical resource waters, impaired waters, and waters of the United States within 100-year floodplains.

One commenter recommended that the **Federal Register** notice announcing the final new and modified NWPs contain a compilation of all regulatory information concerning the NWPs to make the preamble discussions available to the regulated public. Another commenter indicated that the Corps cannot issue provisional NWP authorizations in states that have denied water quality certification for those NWPs.

All **Federal Register** notices concerning the new and modified NWPs are currently available to the public. Due to the length of these notices and the many changes that have occurred since these NWPs were initially proposed on July 1, 1998, it would be impractical to compile the preambles for all of these notices into one document. In the July 21, 1999, **Federal Register** notice (64 FR 39261), we addressed comments concerning the issuance of provisional NWP verifications and we have not changed our position on this matter.

One commenter said that the new NWPs and general conditions should not become effective until six to nine months after the new NWPs are issued, so that activities that have already been planned can proceed under the NWPs issued in 1996. One commenter objected to using NWPs to authorize the expansion of existing projects, stating that this discourages avoidance and minimization of losses of waters of the United States. One commenter stated that the new and modified NWPs should address impacts to prior converted cropland. Several commenters said that NWP 29 should be revoked.

The new and modified NWPs, including the new and modified general conditions, will become effective on June 5, 2000. Until the effective date of the new and modified NWPs and general conditions, the current NWPs (as published in the December 13, 1996, **Federal Register**) are applicable. Permittees that begin work, or are under contract to begin work, prior to the effective date of the new and modified NWPs, have one year to complete the work under the term and conditions of the NWPs issued in 1996. However, in a notice published in the December 15, 1999, issue of the **Federal Register** (64 FR 69994), we established a procedure for processing NWP 26 PCNs. We do not agree that a longer implementation schedule is necessary. In addition, an extended implementation schedule would be contrary to our intent to replace NWP 26 with activity-specific NWPs that authorize activities with minimal adverse effects on the aquatic environment.

The use of NWPs to authorize the expansion of existing projects does not discourage avoidance and minimization of activities in waters of the United States. These activities are required to comply with all NWP terms and conditions, including General Condition 19, and must result only in minimal adverse effects on the aquatic environment. The new and modified NWPs do not need to address impacts to prior converted cropland, since these areas are not waters of the United States. If prior converted cropland is abandoned and reverts back to jurisdictional wetlands, then those areas are subject to the permit requirements of Section 404 of the Clean Water Act. We do not agree that NWP 29 should be revoked, since it authorizes single family housing activities with minimal adverse effects on the aquatic environment.

III. Comments and Responses on Specific Nationwide Permits

3. Maintenance: In the July 21, 1999, **Federal Register** notice, we proposed to modify this NWP to authorize the removal of accumulated sediment in the vicinity of existing structures and authorize activities in waters of the United States associated with the restoration of uplands damaged by storms, floods, or other events. These additional activities are in paragraphs (ii) and (iii), respectively, of this NWP.

One commenter said that the proposed modifications are not

maintenance activities and should not be authorized by this NWP. Some commenters requested clarification whether this NWP only applies to activities not statutorily exempt under section 404(f)(1)(B) of the Clean Water Act. One commenter objected to this NWP, stating that it is used to change existing projects to different use categories. Another commenter asked what is meant by the phrase ''minor deviations in the structure's configuration or filled area.''

We believe that the activities authorized by paragraphs (ii) and (iii) of this NWP are maintenance activities. The note at the end of this NWP states that NWP 3 authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Section 404(f) exemptions for maintenance. The first sentence of paragraph (i) explicitly states that NWP 3 does not authorize changes in use for the authorized structure or fill. The phrase ''minor deviations in the structure's configuration or filled area'' allows the project proponent to make minor changes to a previously authorized structure or fill during the repair or maintenance activity so that the structure or fill complies with current construction standards or other regulations.

Several commenters supported the removal of the notification requirement from paragraph (i) of this NWP. One commenter said that replacement activities should allow reconfiguration of structures such as marina piers. One commenter believes that paragraph (i) contains contradictory language because it authorizes the repair, replacement, or rehabilitation of previously authorized, currently serviceable structures or fills and the replacement of structures destroyed by storms. Another commenter said that some maintenance activities take longer than two years and recommended that the NWP be modified to accommodate those longer repair periods. One commenter recommended that the NWP authorize the use of cofferdams during maintenance activities.

The reconfiguration of marinas is authorized by NWP 28. The reconfiguration of other types of structures may be authorized by other NWPs, regional general permits, or individual permits. Authorizing the repair of currently serviceable structures or fills and the replacement of structures or fills damaged by storms, floods, or other discrete events is not contradictory because both of these activities are maintenance activities that typically have minimal adverse effects on the aquatic environment. These provisions are also consistent with the Section 404(f) exemptions for maintenance. We do not agree that it is necessary to increase the two-year limit for maintenance activities because this amount of time is adequate for most maintenance activities. In addition, NWP 3 contains a provision that allows district engineers to waive this time limit. The use of cofferdams during maintenance activities may be authorized by NWP 33.

Some commenters recommended removing the proposed limitations in paragraph (ii) of NWP 3. Several commenters suggested adding acreage limits to paragraph (ii) and others suggested that the 200 linear foot limit should be reduced to 50 feet. One commenter stated that this provision is unnecessary and that NWP 3 should not be modified to authorize this activity. Another commenter said that paragraph (ii) should not authorize the installation of rip rap.

We believe that the 200 linear foot limit for the removal of accumulated sediments in the vicinity of existing structures is appropriate and will ensure that this NWP authorizes only activities with minimal adverse effects on the aquatic environment. The removal of accumulated sediments allows structures to continue to function properly and ensure the safety of the users of the structure. The installation of rip rap is often necessary to protect these structures after the accumulated sediment is removed and should be authorized by this NWP as part of the single and complete project.

One commenter supported paragraph (iii) of the proposed modification of NWP 3, which authorizes activities in waters of the United States associated with the restoration of uplands damaged by storms and other discrete events. One commenter said that paragraph (iii) is unnecessary because these activities should be considered exempt and bank stabilization can be authorized by NWP 13. One commenter stated that the activities authorized by paragraph (iii) will have more than minimal adverse effects on the aquatic environment. Two commenters objected to the proposed modification, stating that it would prevent natural stream processes from occurring and allow stream channelization. A commenter said that this NWP should not authorize bank stabilization activities in floodplains. Another commenter stated that separate authorization should not be required if excavated material is used to replace material that is lost as a result of erosion. One commenter recommended modifying the text of paragraph (iii) to state that the NWP does not authorize the replacement of uplands lost through gradual erosion processes.

The intent of paragraph (iii) of NWP 3 is to authorize activities in waters of the United States associated with the replacement of uplands that are damaged as a result of storms and other catastrophic events. The restoration of uplands damaged as a result of storms and other catastrophic events is exempt from Section 404 permit requirements, as long as the upland area is replaced to its original extent. For example, a hurricane may cause substantial erosion and destroy a section of a road constructed in uplands or on a permitted fill. The restoration of those uplands or the permitted fill and the replacement of the destroyed road are exempt from Section 404 permit requirements, provided the area is repaired to its original extent. However, the restoration work may involve activities in waters of the United States, which are authorized by paragraph (iii), provided those activities comply with the terms and conditions of NWP 3. We maintain our position that this is a maintenance activity that should be authorized by NWP 3. Paragraph (iii) does not authorize new stream channelization or stream relocation activities. We believe that bank stabilization is a necessary component of this activity and should be authorized by paragraph (iii) as part of the single and complete project. We concur with the last comment in the previous paragraph and have made the appropriate modification of the text of paragraph (iii).

One commenter indicated that the district engineer should have discretion over which flood damage repair activities require notification and another commenter said that notification should not be required for any of these activities. One commenter suggested that the 50 cubic yard limit for removal of obstructions should be replaced with 500 linear foot and ⅓ acre limits.

We contend that notification should be required for all of the activities authorized by paragraph (iii) to ensure that these activities result in minimal adverse effects on the aquatic environment. We do not agree that the 50 cubic yard limit for the removal of obstructions should be replaced with 500 linear foot or ⅓ acre limits.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The

issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. This NWP is subject to General Condition 25, which requires notification for activities in designated critical resource waters. NWP 3 is reissued with the modifications discussed above.

7. *Outfall Structures and Maintenance:* In the July 21, 1999, **Federal Register** notice, we proposed to modify NWP 7 to authorize maintenance excavation, including dredging, to remove accumulated sediments from intake or outfall structures and canals associated with these structures.

Several commenters stated that the maintenance activities authorized by the proposed modification of this NWP are exempt from permit requirements. Numerous commenters indicated that the removal of accumulated sediments should be authorized by NWP 3 and that the modification of this NWP is unnecessary. Several commenters requested clarification regarding what types of maintenance activities are authorized by this NWP. Another commenter said that the Corps should withdraw the proposed modification. This commenter also recommended prohibiting removal of material in special aquatic sites and small impoundments. One commenter said that the construction of outfall structures that does not involve discharges of dredged or fill material into waters of the United States should not require a Corps permit.

Maintenance dredging to remove accumulated sediments from intake and outfall structures in Section 10 waters is not exempt from Corps permit requirements. Although the removal of accumulated sediments in the vicinity of existing structures is authorized by paragraph (ii) of NWP 3, there are maintenance dredging or excavation activities associated with intake and outfall structures that do not meet the terms and conditions of NWP 3 and could be authorized by NWP 7. The text of this NWP clearly states which maintenance activities are authorized by NWP 7. District engineers will review PCNs for maintenance activities in special aquatic sites and small impoundments to ensure that the adverse effects on the aquatic environment are minimal. Outfall structures constructed in Section 10 waters require a Corps permit, even if there are no associated discharges of dredged or fill material into waters of the United States.

One commenter said that acreage and linear limits should be imposed on this NWP. Several commenters contend that this NWP should not authorize activities in tidal waters or special aquatic sites. One commenter stated that this NWP should not authorize maintenance activities associated with aquaculture facilities or power plants. A commenter remarked that maintenance excavation and dredging activities could result in more than minimal adverse effects on the aquatic environment and that notification should be required for all activities authorized by this NWP. Another commenter objected to the requirement for notification for all activities authorized by this NWP.

We do not agree that it is necessary to impose acreage or linear foot limits on the activities authorized by this NWP or restrict the applicable waters because all activities authorized by this NWP require notification to the district engineer. The removal of accumulated sediments from outfall and intake structures associated with aquaculture facilities and power plants is necessary to ensure the efficient operation of these installations. The district engineer will review these PCNs to ensure that the NWP authorizes only those activities with minimal adverse effects on the aquatic environment.

One commenter said that delineations of special aquatic sites should be limited to the impact area or within 200 feet of the proposed activity. Two commenters stated that it is unnecessary to require delineations of special aquatic sites since this NWP authorizes maintenance activities. One commenter remarked that there should be a provision in the NWP that allows maintenance of existing structures when the original design capacities and configurations are not available. Another commenter said that paragraph (d) of the proposed modification should be removed because this requirement is already addressed by General Condition 3.

The text of this NWP states that the requirement for delineations of special aquatic sites is limited to the vicinity of the proposed work. The delineation of special aquatic sites, especially vegetated shallows, is necessary to ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. If the original design capacities and configurations of the facility are not available, district engineers will use their judgement to determine if the proposed work is authorized by this NWP. The requirements of paragraph (d) of this NWP and General Condition 3 are not the same. Therefore, we believe that paragraph (d) is necessary to ensure that NWP 7 authorizes only activities with minimal adverse effects on the aquatic environment.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. NWP 7 is reissued with the modifications discussed above.

12. Utility Line Activities: In the July 21, 1999, **Federal Register** notice, we proposed to modify NWP 12 to authorize utility line substations; foundations for overhead utility line towers, poles, and anchors; and permanent access roads for the construction and maintenance of utility lines.

Many commenters supported the proposed modifications, but a few commenters opposed the proposed modifications. Several commenters believe that this NWP will authorize activities with more than minimal adverse effects on the aquatic environment. One commenter said that NWP 12 should have a maximum limit of 2 acres for a single and complete utility line activity and another commenter suggested a ⅓ acre limit. One commenter supported the ¼ acre PCN threshold and also recommended requiring notification for activities that result in the loss of greater than 100 linear feet of stream bed, with agency coordination for activities that result in the loss of greater than 250 linear feet of stream bed. Another commenter said that the PCN threshold should be ⅓ acre. One commenter requested clarification concerning the emergency authorization of utility line activities.

The terms and conditions of this NWP, including PCN requirements, will ensure that NWP 12 will authorize only activities with minimal individual and cumulative adverse effects on the aquatic environment. We do not agree that an overall acreage limit is appropriate for this NWP, since many of the impacts to waters of the United States caused by the construction and maintenance of utility lines will be temporary. Acreage limits and PCN thresholds for specific activities authorized by this NWP are discussed below. This NWP can be used to authorize the emergency installation,

replacement, or repair of utility lines in waters of the United States. Emergency procedures for the Corps regulatory program are discussed in 33 CFR 325.2(e)(4).

One commenter said that this NWP is too restrictive for the installation of underground gas transmission lines. Two commenters stated that this NWP should authorize wireless communication towers. Another commenter suggested that well drilling fluid flowlines should be authorized by this NWP. One commenter said that pipeline maintenance activities should be exempt from permit requirements. A commenter stated that PCNs should be required for all underground utility lines to ensure that the installation of those utility lines does not drain wetlands. Another commenter said that sidecast material from utility line installation should be removed within 30 days. One commenter indicated that utility lines constructed in waters of the United States parallel to streambeds should be limited to 500 feet in length to ensure that those activities result in minimal adverse effects on the aquatic environment.

This NWP authorizes the construction, maintenance, and repair of utility lines, including underground gas transmission lines, that have minimal adverse effects on the aquatic environment. We do not agree that the terms for underground transmission lines are too restrictive. This NWP does not authorize wireless communication towers because these facilities are not utility lines. Well drilling fluid flowlines are not authorized by this NWP, because they are not utility lines. The construction or installation of wireless communication towers or well drilling fluid flowlines in waters of the United States can be authorized by individual permits, regional general permits, or other NWPs. Pipeline maintenance activities can be authorized by this NWP or NWP 3, although some pipeline maintenance activities may be eligible for the Section 404(f) exemption. This NWP contains specific terms to ensure that the installation of utility lines does not drain wetlands. This NWP does not authorize the installation of utility lines that result in french drains. We believe that the 180 day limit is appropriate for temporary sidecasting of excavated material, but division engineers can regionally condition this NWP to reduce this time period, if such a reduction is necessary to ensure that the NWP authorizes only activities with minimal adverse effects. Paragraph (d) of the ''Notification'' section of this NWP will allow district engineers to review proposed utility lines to be installed in waters of the United States parallel to stream beds and ensure that these activities result in minimal adverse effects on the aquatic environment.

One commenter requested clarification whether a Corps permit is required if the United States Coast Guard does not require a permit under Section 9 of Rivers and Harbors Act. Another commenter said that pipelines are transportation structures.

A Section 10 permit is not required for utility lines constructed over navigable waters of the United States to transport gaseous, liquid, liquifiable, or slurry substances, because these structures are considered bridges which are regulated under Section 9, not Section 10, of the Rivers and Harbors Act. Pipelines constructed over navigable waters may be considered bridges under Section 9 of the Rivers and Harbors Act.

Two commenters supported the inclusion of utility line substations in the proposed modification of this NWP. One commenter said that the acreage limit of utility line substations should be ¼ acre. Several commenters recommended adding ''storage facilities'' to paragraph (ii) to authorize these activities with utility line substations. Two commenters requested a definition of the term ''substation.'' One commenter said that this NWP should not authorize the construction of substations in floodplains. Another commenter stated that electric and pumping substations should be sited in uplands.

We have changed the acreage limit for the construction or expansion of utility line substations to ½ acre, to ensure that this NWP authorizes only activities with minimal adverse effects on the aquatic environment. Notification is required for discharges of dredged or fill material resulting in the loss of greater than ⅒ acre of non-tidal waters of the United States for the construction or expansion of utility line substations.

We do not agree that storage facilities should be included with utility line substations. These facilities may be authorized by NWPs, regional general permits, or individual permits. The term ''utility line substations'' includes power line substations, lift stations, pumping stations, meter stations, compressor stations, valve stations, small pipeline platforms, and other facilities integral to the operation of a utility line. There are situations where utility line substations must be located in waters of the United States within 100-year floodplains or other waters of the United States. Utility line substations constructed in waters of the United States within 100-year floodplains must comply with General Condition 26.

One commenter recommended limiting foundations for overhead utility line towers, poles, and anchors to 1 acre or 250 linear foot of stream bed. This commenter also said that losses of waters of the United States resulting from the installation of overhead utility line towers, anchors, and poles should be included with the impacts caused by utility line substations when determining if an activity meets the acreage limits of this NWP.

We do not believe it is necessary to impose an acreage limit on foundations for overhead utility line towers, poles, and anchors, but division engineers can regionally condition this NWP to impose such limits if it is necessary to ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. We do not agree that foundations for overhead utility line towers, poles, and anchors should be included with the acreage limit for utility line substations. For those utility line activities that require notification, district engineers will review PCNs to ensure that these activities result in minimal adverse effects on the aquatic environment.

One commenter objected to the proposed modification to authorize the construction of permanent access roads in waters of the United States. Another commenter asked whether permanent or temporary access roads are authorized by paragraph (iv) of this NWP. One commenter said that the 1 acre limit is too high and recommended a ⅒ acre limit for permanent access roads. Another commenter recommended a 250 linear foot limit on stream bed impacts for the construction of access roads. One commenter asked if the 500 linear foot PCN threshold for permanent access roads constructed above-grade in waters of the United States applies to an entire project or a single crossing.

Permanent access roads are necessary for the operation and maintenance of utility lines and should be authorized by this NWP as part of a single and complete utility line project. Paragraph (iv) of the NWP authorizes only permanent access roads; temporary access roads can be authorized by NWP 33. We have changed the acreage limit for above-grade permanent access roads to ½ acre, to ensure that this NWP authorizes activities with minimal adverse effects on the aquatic environment. We do not agree that it is necessary to impose a 250 linear foot limit on stream bed impacts for access roads, since most of the access roads will be constructed perpendicular to

streams. The 500 linear foot PCN threshold for access roads applies to each single and complete crossing (see 33 CFR 330.2(i)).

One commenter supported the provision requiring access roads to be constructed with pervious surfaces. Two commenters objected to this requirement. One of these commenters noted that it may not be possible to utilize pervious surfaces, because those materials may not be practicable, stable, or safe in certain situations.

We have deleted the last sentence of paragraph (iv) to allow this NWP to authorize permanent access roads constructed with impervious material. However, to ensure that permanent access roads constructed with impervious material result in minimal adverse effects on the aquatic environment, we have added paragraph (g) to the ''Notification'' section to require notification when access roads for utility lines are constructed with impervious materials.

One commenter requested clarification whether this NWP authorizes mechanized landclearing necessary to maintain a previously established utility line right-of-way. One commenter said that this NWP should not authorize mechanized landclearing of forested wetlands, unless the acreage and functions of those wetlands are replaced. Several commenters objected to the requirement for mitigation to offset permanent adverse effects to waters of the United States, such as the conversion of forested wetlands to emergent wetlands in permanently maintained utility line right-of-ways. One commenter objected to the language in the NWP that excludes temporary adverse effects due to filling, flooding, excavation, or drainage from the calculation of permanent losses of waters of the United States. One commenter said that mitigation plans should be required with all PCNs. Two commenters supported the Corps position that it does not regulate groundwater flow. Another commenter said that this NWP should be conditioned to prohibit impacts to groundwater.

This NWP authorizes mechanized landclearing that is necessary to maintain an existing utility line right-of-way, provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained as close as possible. District engineers will require mitigation for the permanent conversion of wetland types to ensure that utility line activities will result in minimal adverse effects on the aquatic environment. Impacts to waters of the United States due to temporary filling, flooding, excavation, or drainage should not be considered as permanent losses, because this NWP requires the restoration of temporarily affected waters of the United States. We do not agree that it is necessary to require the submission of mitigation plans with all PCNs, because compensatory mitigation is not required for all utility line activities. We maintain our position that we do not regulate groundwater flows, but district engineers may consider adverse effects to groundwater when reviewing PCNs.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For utility line activities resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. NWP 12 is reissued with the modifications discussed above.

14. Linear Transportation Crossings: In the July 21, 1999, **Federal Register** notice, we proposed to modify NWP 14 to authorize the construction, expansion, modification, or improvement of linear transportation crossings, with a higher acreage limit for public linear transportation crossings constructed in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters.

Two commenters said that the proposed modification of NWP 14 will authorize activities with more than minimal adverse effects on aquatic environment. Two commenters said that this NWP should have the same terms and conditions as NWPs 41 and 43 because these NWPs authorize similar activities.

The terms and conditions of this NWP will ensure that only activities with minimal adverse effects on the aquatic environment will be authorized. Most activities authorized by this NWP require notification to the district engineer, which will allow case-by-case review of proposed NWP 14 activities. NWPs 14, 41, and 43 authorize distinctly different activities and should not contain the same terms. However, these NWPs can be combined to authorize a single and complete project, provided the activity complies with General Condition 15.

One commenter supported limiting the modification of this NWP to the authorization of linear transportation crossings. Another commenter said that this NWP should not authorize new linear transportation crossings. A commenter stated that the maintenance of road crossings should be exempt from permit requirements and that NWP 14 should be needed only for the construction of new crossings. One commenter indicated that this NWP should be limited to the construction of span bridges and should not authorize culverted crossings. A commenter said that the NWP should authorize integral features associated with the linear transportation crossing. One commenter objected to the proposed modification, stating that it should not authorize the expansion of airport runways. Two commenters said that the term ''public-use airport'' should be used when describing airport runways that are to be used by the general public and considered as public transportation crossings.

We have not changed the categories of authorized activities from the proposed modification of NWP 14 published in the July 21, 1999, **Federal Register** notice. Some road crossing maintenance activities may qualify for the Section 404(f) exemption and not require a DA permit. Maintenance activities that require changes in the configuration or design of the linear transportation crossing are authorized by this NWP, provided the work meets the terms and conditions of the NWP and results in minimal adverse effects on the aquatic environment. We do not agree that this NWP should be limited to span bridges. Culverts and fords can be used to construct linear transportation crossings that have minimal adverse effects on the aquatic environment. Features that are an integral part of the linear transportation crossing, such as interchanges, rail spurs, stormwater detention basins, and water quality enhancement measures are authorized by this NWP. However, this NWP can be combined with other NWPs to authorize a single and complete project provided the activity complies with the requirements of General Condition 15. We maintain our position that this NWP should authorize the expansion of airport runways. We do not agree that it is necessary to incorporate the term ''public-use airport'' in the text of the NWP. District engineers will determine on a case-by-case basis whether the

construction of a linear transportation crossing for an airport is a public or private activity.

Several commenters objected to the differentiation between public and private linear transportation crossings for the acreage limits of the proposed modification of this NWP. Two commenters agreed that public linear transportation crossings should have higher acreage limits under this NWP. One commenter requested clearer definitions of the terms ''public'' and ''private'' as used in the context of this NWP. This commenter asked if the determination whether a particular activity is public or private depends upon the users of the linear transportation crossing or the project proponent. For example, if a private developer is required to build a road that will be used by the general public as a condition of subdivision approval, would that road be considered a public or private road for the purposes of this NWP?

We maintain our position that public linear transportation crossings should have a higher acreage limit because they fulfill a larger proportion of public interest factors and the government agencies that typically sponsor and build these projects have the resources necessary to ensure that these projects have minimal adverse effects on the aquatic environment. Public transportation projects often require detailed planning processes to document compliance with the National Environmental Policy Act, Section 404 of the Clean Water Act, and other applicable laws. As a result, we have decided that it is appropriate to impose a higher acreage limit for public linear transportation projects in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters.

Public linear transportation crossings are available for use by the general public. Private linear transportation crossings are restricted to use by an individual or a specific group of individuals. The users of the crossing determine whether the crossing is public or private, not the builder of the transportation crossing. Public roads that are constructed as a condition of subdivision approval and will be used by the general public are considered public linear transportation crossings for the purposes of this NWP.

Many commenters recommended a 2 acre limit for public linear transportation crossings. One commenter suggested a 3 acre limit. Two commenters said that the 1 acre limit for public linear transportation crossings is too low. Several commenters stated that this NWP should have a ⅓ acre limit. One commenter said that the length of fill should not exceed 200 feet and another commenter remarked that the 200 foot restriction for fills should be removed from the NWP. Two commenters recommended replacing the 200 foot limit with a 500 foot limit. One commenter suggested a 500 linear foot limit for stream bed impacts.

We have determined that the maximum acreage limit for this NWP should be ½ acre, to ensure that this NWP only authorizes activities with minimal adverse effects on the aquatic environment. For public linear transportation crossings constructed in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, the acreage limit will be ½ acre. For public linear transportation crossings in tidal waters or non-tidal wetlands adjacent to tidal waters, the acreage limit will be ⅓ acre. For private linear transportation crossings, the acreage limit will be ⅓ acre. The 200 foot limit for the length of fill in waters of the United States will be retained for public linear transportation crossings constructed in tidal waters or non-tidal wetlands adjacent to tidal waters and for private linear transportation crossings.

One commenter said that PCNs should be required for all activities authorized by this NWP. Several commenters recommended a PCN threshold of ⅓ acre. Two commenters suggested that PCNs should be required for discharges of dredged or fill material resulting in the loss of greater than 500 linear feet of stream bed. Three commenters said that notification should not be required for all discharges into special aquatic sites. One commenter requested clarification concerning when a PCN is required for discharges into waters of the United States that are not special aquatic sites.

We have modified this NWP to require notification for discharges of dredged or fill material resulting in the loss of greater than 1/10 acre of waters of the United States. We are retaining the notification requirement for all discharges of dredged or fill material into special aquatic sites. If the proposed work does not involve discharges of dredged or fill material into special aquatic sites, the prospective permittee is required to notify the district engineer if the proposed work will result in the loss of greater than 1/10 acre of waters of the United States.

One commenter asked if the acreage limits for this NWP apply only to permanent losses of waters of the United States. Three commenters requested clarification whether the requirement for a mitigation proposal in paragraph (c) applies to the mitigation process (i.e., avoidance, minimization, and compensation) or only to compensatory mitigation. One commenter said that there should be an acreage threshold for the requirements of paragraph (c). One commenter said that mitigation should be required for all impacts to waters of the United States and another commenter stated that mitigation should be required for discharges resulting in the loss of greater than 1 acre of waters of the United States.

In accordance with the definition of the term ''loss of waters of the United States'' in the ''Definitions'' section of the NWPs, the acreage limit applies only to permanent losses of waters of the United States. We have inserted the word ''compensatory'' before the phrase word ''mitigation proposal'' in paragraph (c) to clarify that the prospective permittee must submit a compensatory mitigation proposal with the PCN. The requirement for a compensatory mitigation proposal applies only to those activities that require notification. District engineers can determine, on a case-by-case basis, that compensatory mitigation is not necessary to offset losses of waters of the United States because the work, without compensatory mitigation, will result in minimal adverse effects on the aquatic environment. We have also inserted the phrase ''of waters of the United States'' after the term ''temporary losses'' in paragraph (c) to clarify that the required statement must address temporary losses of waters of the United States.

One commenter suggested that notification should be required if NWP 14 was previously used to authorize a road crossing on the same waterbody. Another commenter objected to considering each crossing of a separate waterbody as a distinct single and complete project. One commenter said that the second sentence of paragraph (h) should be deleted because it contradicts the definition of the term ''single and complete project.''

Since notification is required for all discharges of dredged or fill material into special aquatic sites and discharges resulting in the loss of greater than 1/10 acre of waters of the United States, most activities authorized by this NWP will require notification to the district engineer. If NWP 14 is used more than once by different project proponents to cross a single waterbody, the district engineer will assess the adverse effects on the aquatic environment and determine if those adverse effects are minimal. The second sentence of

paragraph (h) does not contradict the Corps definition of the term ''single and complete project'' at 33 CFR 330.2(i).

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For linear transportation crossings resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. NWP 14 is reissued with the modifications discussed above.

27. Stream and Wetland Restoration Activities: In the July 21, 1999, **Federal Register** notice, we proposed to modify NWP 27 to authorize the restoration of tidal waters and the restoration and enhancement of non-tidal streams and non-tidal open waters.

One commenter supported the expansion of this NWP to tidal waters. This commenter requested clarification regarding which restoration activities can occur in Section 10 waters and tidal waters. One commenter said that the title of this NWP should be changed to include creation activities. This commenter asked for clarification concerning the types of wetland creation activities that are authorized by this NWP. This commenter said that a Corps permit should be required only if the wetland creation activity includes connecting the wetland creation site to waters of the United States. One commenter said that restoration activities should be limited to restoring areas to their historic state and another commenter stated that NWP 27 should authorize activities that are part of a watershed improvement plan. One commenter said that this NWP should have enforceable conditions and permittees should be required to obtain restoration agreements that are approved by the Corps and the resource agencies. One commenter recommended a 2 acre limit for this NWP. Another commenter recommended that the Corps add a note to this NWP that is similar to the note at the end of NWP 39, which describes open waters of the United States.

This NWP authorizes the restoration of former tidal waters, the enhancement of degraded tidal wetlands, and the creation of tidal wetlands. We do not agree that it is necessary to include the word ''creation'' in the title of this NWP, since it is clearly indicated in the first paragraph of this NWP that wetland creation activities are authorized. This NWP provides authorization for all wetland creation activities, provided those activities comply with the terms and conditions of this NWP. Wetland creation activities that do not involve discharges of dredged or fill material into waters of the United States do not require a Section 404 permit. We do not agree that this NWP should be limited to restoring wetlands to their historic state, because restoration projects result in net improvements to the aquatic environment, even though they may not restore former waters to their historic state. This NWP can authorize the restoration, enhancement, and creation of aquatic habitats that are part of a watershed improvement plan.

We do not agree that it is necessary to execute restoration agreements for all activities authorized by this NWP. Such a provision would likely to discourage landowners from conducting these activities. Since this NWP authorizes activities that benefit the aquatic environment, an acreage limit would be counterproductive. The activities authorized by this NWP either require notification to the district engineer or involve oversight by other Federal agencies, which will ensure that only activities that benefit the aquatic environment are authorized by this NWP. A definition of the term ''open water'' is included in the ''Definitions'' section of the NWPs. Therefore, it is not necessary to include a note in this NWP.

One commenter said that this NWP should authorize the restoration and enhancement of tidal wetlands and streams. Another commenter stated that NWP 27 should authorize restoration, enhancement, and creation activities in drainage ditches, because it is difficult to distinguish between drainage ditches and streams in the mid-West. Several commenters believe that significant stream destruction can be authorized by this NWP and suggested imposing a limit of 250 linear feet on stream impacts.

This NWP authorizes the restoration and enhancement of tidal wetlands, but it does not authorize the restoration of tidal streams, particularly the open water areas of tidal streams. However, the restoration and enhancement of riparian zones next to tidal streams is authorized by this NWP. The restoration of tidal streams is not authorized by NWP 27 because changes in tidal aquatic habitats may result in more than minimal adverse effects on the aquatic environment. The restoration of tidal streams can be authorized by individual permits or regional general permits. This NWP authorizes the restoration and enhancement of non-tidal streams that were channelized to create drainage ditches, including the restoration and enhancement of riparian zones next to those streams. Since the activities authorized by NWP 27 benefit the aquatic environment and most activities require notification or oversight by other agencies, we do not agree that it is necessary to impose a linear limit on stream impacts.

One commenter said that this NWP should authorize only those activities that are conducted or sponsored by Federal or state agencies. Two commenters support the use of this NWP to authorize the restoration of aquatic habitats on public or private land. One commenter stated that the recommendation in paragraph (c) to plant native species on the project site should be modified to require the permittee to use local sources of plant materials.

Limiting this NWP to activities conducted or sponsored by Federal or state agencies would preclude the use of an NWP for many aquatic habitat restoration, enhancement, and creation activities conducted by private individuals that benefit the aquatic environment. We do not agree that permittees should be required to use local sources of plant materials.

One commenter objected to the provision that allows the relocation of aquatic habitats on the project site, stating that this provision is contrary to the avoidance and minimization requirements of the NWPs. Another commenter said that the relocation of aquatic habitats should be authorized only when it is ecologically preferable than avoidance and minimization. This commenter also requested that the NWP contain a provision that requires the relocated waters to be equal or greater in acreage than the waters of the United States filled as a result of the authorized activity. One commenter indicated that the relocation of aquatic habitats on the project site should not be authorized by this NWP.

Allowing the relocation of non-tidal waters on the project site is not contrary to General Condition 19 because NWP 27 requires authorized activities to result in net gains in aquatic resource functions and values. We are retaining

the provision that allows the relocation of non-tidal waters on the project site.

One commenter opposed the use of rip rap for activities authorized by this NWP and another commenter supported the use of rip rap. One commenter said that the removal of accumulated sediments requires a Corps permit only when the work is conducted in navigable waters (i.e., Section 10 waters). Another commenter asked if the removal of accumulated sediments is authorized only once or if this activity can occur for the duration of the project to maintain the restored areas. One commenter stated that this NWP should also authorize the management of the restored, created, or enhanced waters.

Rip rap provides habitat for many species of aquatic organisms and its use should be authorized by this NWP, provided the authorized work results in net gains in aquatic resource functions and values. The Corps regulatory authority regarding excavation activities in waters of the United States is addressed in a previous section of this **Federal Register** notice. The removal of accumulated sediments is authorized by this NWP as often as necessary to maintain the restored areas, although the permittee should endeavor to locate the sediment source and try to stabilize that area to reduce inputs of sediment in the restored waters. This NWP authorizes activities necessary to maintain the restored, enhanced, or created aquatic habitats.

One commenter asked for a definition of the term ''small'' water control structure. This commenter recommended defining a small water control structure as a structure that impounds water to a maximum depth of 2.5 feet or less. This commenter also requested clarification concerning the extent of mechanized landclearing activities that are authorized by this NWP to remove undesirable vegetation. This commenter said that mechanized landclearing should be limited to establishing or maintaining native herbaceous wetland plant species and selected plant species that provide food for wildlife. This commenter recommended limiting mechanized landclearing to vegetation that has a diameter at breast height of 4 inches or less.

We do not believe that it is necessary to specify the dimensions of small water control structures that are authorized by this NWP. For those activities that require notification, the district engineer will determine whether the water control structure is authorized by this NWP. This NWP authorizes mechanized landclearing to remove undesirable vegetation and we recommend replacing the removed vegetation with native plant species. We do not agree that mechanized landclearing activities authorized by this NWP should be limited to vegetated that has a diameter at breast height of 4 inches or less, because the proposed work may require the removal of larger undesirable trees.

One commenter supported the provision that the conversion of natural wetlands to another aquatic use is not authorized by NWP 27. Two commenters stated that the construction of water impoundments should not be authorized by this NWP. One commenter opposed the prohibition against the impoundment of streams or the conversion of forested wetlands to construct waterfowl impoundments, because this commenter believes that these activities benefit the aquatic environment. This commenter supports the term of NWP 27 that prohibits the channelization of streams.

We maintain our position that this NWP should not authorize the impoundment of streams or the conversion of forested wetlands to construct waterfowl impoundments. These activities often result in more than minimal adverse effects to the aquatic environment by destroying or degrading habitat that is utilized by many other species of wildlife. However, open water impoundments can be created from uplands on the project site or by converting a non-tidal emergent or scrub-shrub wetland, provided that wetland type is recreated elsewhere on the project site and there are net gains in aquatic resource functions and values on the project site.

One commenter stated that all reversion activities on agricultural lands should be authorized by NWP 40 and all reversion activities on reclaimed surface coal mined lands should be authorized by NWP 21. Another commenter requested clarification of the provision that authorizes the reversion of wetlands restored, created, or enhanced on prior converted cropland. This commenter also suggested that a five year time limit for reversions should apply to agreements with the U.S. FWS or NRCS that do not have time limits. One commenter stated that the paragraph of NWP 27 that address reversion activities implies that the Corps is asserting jurisdiction over wetlands that were created on prior converted cropland, even though a Corps permit was not required to restore wetlands on that cropland. This commenter said that the Corps cannot consider all created wetlands to be jurisdictional wetlands.

It is more appropriate to authorize reversion activities by NWP 27, since this NWP was likely to be used to authorize the initial wetland restoration, enhancement, or creation activity. This NWP authorizes the reversion of wetlands that were restored, enhanced, or created on prior converted cropland that has not been abandoned, because prior converted croplands are not waters of the United States and a Section 404 permit is not required for discharges of dredged or fill material into prior converted cropland. We do not agree that it is necessary to impose a five year limit for reversions on U.S. FWS or NRCS agreements that do not have time limits. A Section 404 permit is not required to revert wetlands that are not considered waters of the United States.

One commenter supported the note in the proposed modification of NWP 27, which states that compensatory mitigation is not required for activities authorized by this NWP, provided there are net increases in aquatic resource functions and values in the project area. Two commenters said that this NWP should be used to authorize all compensatory mitigation projects. One commenter supports the use of NWP 27 to authorize the establishment of mitigation banks. Many commenters objected to the use of NWP 27 to authorize discharges of dredged or fill material into waters of the United States to construct mitigation banks. Several commenters oppose this provision, stating that mitigation banks should be subject to public comment because they affect local development patterns and land prices. The Corps received comments that it appeared that NWP 27 could be used to authorized mitigation banks that may not have been approved by an Interagency Mitigation Banking Review Team. That was not our intent. NWP 27 can only be used to authorize impacts at a mitigation bank that has been approved under the National Interagency Federal Mitigation Banking Guidance.

We maintain our position that NWP 27 may be used to authorize compensatory mitigation projects, including mitigation banks, that involve activities in waters of the United States, provided the work results in a net increase in aquatic resource functions and values in the project area. The use of NWP 27 to authorize mitigation banks does not override the Federal guidance for the establishment, use, and operation of mitigation banks that was issued in 1995. We do not agree that it is necessary to require individual permits for all mitigation banks, because they benefit the aquatic environment.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that

the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. This NWP is subject to General Condition 25, which requires notification for activities in designated critical resource waters. NWP 27 is reissued with the modifications discussed above.

39. Residential, Commercial, and Institutional Developments: In the July 21, 1999, **Federal Register** notice, we proposed to issue an NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction of building pads, building foundations, and attendant features for residential, commercial, and institutional developments.

Many commenters opposed the issuance of the proposed NWP. Two commenters said that this NWP should authorize discharges of dredged or fill material into non-tidal wetlands that are adjacent to tidal waters.

We believe that the scope of waters for this NWP is appropriate to ensure that NWP 39 authorizes only those residential, commercial, and institutional development activities that have minimal adverse effects on the aquatic environment.

One commenter said that this NWP should authorize only single and complete projects that consist of buildings and attached or integral attendant features. This commenter indicated that this NWP should not authorize the expansion of existing developments. Several commenters stated that golf courses should not be authorized by this NWP because they are not necessary for residential developments. Another commenter said that this NWP should authorize discharges of dredged or fill material into waters of the United States for the construction of ski areas, since they are not more environmentally harmful than golf courses.

We maintain our position that this NWP should authorize building pads and attendant features for residential, commercial, and institutional development activities. Attendant features should not be limited to structures or fills that are attached to buildings. This NWP can be used to authorize the expansion of existing developments, provided the adverse effects on the aquatic environment are minimal, individually and cumulatively. Many residential subdivisions are constructed with golf courses as important attendant features. These types of residential communities are marketed as golf course communities. We do not agree that ski areas are attendant features of residential communities in the same manner as golf courses. Ski resorts are usually constructed first, with residences constructed at a later time.

A large number of commenters supported the indexed acreage limit for NWP 39 that was proposed in the July 21, 1999, **Federal Register** notice. Many commenters opposed the proposed indexed acreage limit. Two commenters objected to the indexed acreage limit, stating that minimal impact determinations are based on the size and quality of the aquatic resources, not the size of the parcel owned by the applicant. A commenter remarked that the indexed acreage limit will encourage developers to build larger projects to qualify for higher acreage limits. Three commenters said that an indexed acreage limit based on project size will not ensure minimal adverse effects on the aquatic environment. Numerous commenters stated that the maximum 3 acre limit is too high. Several commenters said that the maximum indexed acreage limit should be 1 acre. Another commenter suggested a maximum indexed acreage limit of 10 acres. Several commenters recommended that the Corps impose a simple 5 acre limit for this NWP. A number of commenters suggested a simple 10 acre limit for discharges of dredged or fill material into ephemeral streams.

To ensure that this NWP authorizes only activities with minimal adverse effects on the aquatic environment, we have decided to impose a simple ½ acre limit on NWP 39. We have not adopted the indexed acreage limit, which will make NWP 39 easier to implement for both the Corps and the regulated public.

Various commenters suggested 100, 200, 250, and 500 linear foot limitations for stream impacts. One commenter said that NWP 39 should have a limit for perennial and intermittent stream bed impacts.

We have added a 300 linear foot limit for stream bed impacts (i.e., filling and excavating perennial and intermittent stream bed) to this NWP at paragraph (b). Division engineers can regionally condition this NWP to decrease the 300 linear foot limit for filling and excavating stream bed.

Several commenters suggested a PCN threshold of ⅓ acre. Another commenter said that PCNs should be required for all NWP 39 activities. One commenter stated that notification should be required for discharges resulting in the loss of greater than 500 linear feet of stream bed. One commenter said that a PCN should be required for discharges of dredged or fill material that result in the permanent loss of open waters, not all discharges into open waters. A commenter requested clarification of the PCN thresholds of NWP 39. One commenter said that notification should not be required for discharges into intermittent streams. One commenter recommended removing the phrase ''including wetlands'' at the end of paragraph (c) of the proposed NWP.

To ensure that district engineers will have the opportunity to review all activities that could result in more than minimal adverse effects on the aquatic environment, we have reduced the PCN threshold to 1/10 acre. We are retaining the requirement for notification for all discharges into open waters. The latter notification requirement applies to both temporary and permanent losses of open waters. Notification is not required for all activities authorized by NWP 39. Discharges of dredged or fill material that result in the loss of 1/10 acre or less of non-tidal wetlands do not require the submission of a PCN to the district engineer, although a post-construction notification is required (see paragraph (i)). We have removed the phrase ''including wetlands'' at the end of paragraph (d) (paragraph (c) of the proposed NWP).

One commenter said that paragraph (d) of the proposed NWP 39 (now designated as paragraph (e)) should not imply that this NWP can be used more than once for the same activity.

Paragraph (e) requires the discharge of dredged or fill material into waters of the United States for the residential, commercial, or institutional development activity to be for a single and complete project. NWP 39 can be used more than once for a single and complete project, provided the combined losses of waters of the United States from all of the phases of that single and complete project do not exceed the ½ acre or the 300 linear foot limits for NWP 39.

One commenter expressed support for the statement of avoidance and minimization that is required by paragraph (e) of the proposed NWP 39 (now designated as paragraph (f)). Two commenters stated that the requirement for a written avoidance and minimization statement is similar to an alternatives analysis and would be cost-prohibitive for many mid-sized activities. Another commenter opposed this requirement because the NWP

regulations already require avoidance and minimization.

We are retaining the requirement for the submission of a written statement explaining how avoidance and minimization of losses of waters of the United States was achieved on the project site. This statement should consist of a brief explanation that discusses how the activity was planned to avoid and minimize losses of waters of the United States on-site to the maximum extent practicable. An exhaustive analysis is not required. The required statement will document compliance with General Condition 19 and will help expedite reviews of PCNs by district engineers.

One commenter supported the mitigation requirements for NWP 39. Two commenters stated that compensatory mitigation should be required for all activities authorized by this NWP. Another commenter said that compensatory mitigation should be required for activities that require notification. Two commenters stated that the provision of paragraph (e) of the proposed NWP 39 (now designated as paragraph (f)) that provides the prospective permittee with the opportunity to submit justification explaining why compensatory mitigation is unnecessary should be deleted because it is inconsistent with the compensatory mitigation requirements of the other NWPs. One commenter recommended including a reference to the mitigation provisions in General Conditions 13 and 19 in paragraph (e) of the proposed NWP 39. Another commenter said that all prospective permittees should be required to submit detailed mitigation plans with the PCN.

As discussed elsewhere in this **Federal Register** notice, compensatory mitigation will normally be required for those activities that require notification to the district engineer, to ensure that the authorized work results in minimal adverse effects on the aquatic environment. If the proposed work will result in minimal adverse effects on the aquatic environment without compensatory mitigation, then the district engineer can issue an NWP verification without special conditions that require compensatory mitigation. Allowing the prospective permittee to submit a statement with the PCN to assert that compensatory mitigation is unnecessary to ensure minimal adverse effects is not contrary to the compensatory mitigation requirements of the NWPs. District engineers can determine that compensatory mitigation is necessary to ensure that the adverse effects on the aquatic environment are minimal, even though the prospective permittee may believe that compensatory mitigation should not be required. We have added text to paragraph (f) that refers to General Condition 19, which contains the mitigation requirements for the NWPs. As discussed in the section addressing the NWP general conditions, we have moved the compensatory mitigation information from paragraph (g) of General Condition 13 to General Condition 19. We maintain our position that the prospective permittee can submit either conceptual or detailed compensatory mitigation plans with the PCN. Detailed compensatory mitigation plans can be required as special conditions of the NWP authorization.

One commenter requested clarification of the phrase ''minimal degradation of water quality,'' which appears in paragraph (g) of the proposed NWP 39, because it could be subject to broad interpretation.

The requirements of paragraph (g) (now designated as paragraph (h)) are intended to reinforce the fact that the NWPs can authorize only activities with minimal adverse effects on the aquatic environment, by focusing on two important aspects of the aquatic environment that can be altered by NWP activities, namely water quality and stream flows.

Two commenters object to the requirements of paragraph (h) of the proposed NWP 39 (now designated as paragraph (i)) because it infers that mitigation is required for activities that do not require notification. Another commenter identified an inconsistency in this paragraph, because it contains a reference to stream impacts and this commenter noted that NWP 39 requires notification for all discharges of dredged or fill material into streams.

Compensatory mitigation is not required for those NWP activities that do not require notification to the district engineer. However, compensatory mitigation to offset losses of waters of the United States may be required by state or local permits, which should be reported to the Corps through the post-construction notification required by paragraph (i). We have removed the references to stream bed impacts from paragraph (i), since the NWP requires notification for all discharges into open waters.

One commenter opposed the provisions of paragraph (i) of the proposed NWP 39 (now designated as paragraph (j)), which requires the permittee to establish and maintain, to the maximum extent practicable, vegetated buffers next to open or streams within the project area. Another commenter said that Federal and state lands should be required to have a management plan instead of deed restrictions for vegetated buffers.

The requirements for vegetated buffers next to open waters are discussed in detail in a previous section of this **Federal Register** notice. There is flexibility in the requirements of paragraph (j). If there are open waters or streams within the project area and it is impractical for the project proponent to establish and maintain vegetated buffers next to those waters, then those vegetated buffers are not required. However, other types of compensatory mitigation may be required to ensure that the work results in minimal adverse effects on the aquatic environment. District engineers will determine, on a case-by-case basis, when it is practicable to establish and maintain vegetated buffers and the appropriate width of those vegetated buffers.

Several commenters opposed paragraph (j) of the proposed NWP 39 (now designated as paragraph (k)), which prohibits stream channelization or stream relocation downstream of the point on the stream where the average annual flow is 1 cubic foot per second (cfs). One commenter supported this provision. Some of these commenters indicated that this provision will be difficult to implement in areas with many ephemeral streams. Other commenters stated that this requirement is difficult to implement because it will be expensive and time consuming to determine where the 1 cfs point occurs. One commenter suggested that stream channelization or relocation activities should be limited to ephemeral streams instead of prohibiting these activities downstream of the 1 cfs point. Another commenter recommended replacing the 1 cfs criterion with either a prohibition against channelizing perennial streams or utilizing drainage area instead of average annual flow. This commenter suggested applying the prohibition to streams with a drainage area greater than 250 acres.

We discussed the identification of the 1 cfs point on streams in a previous section of this **Federal Register** notice. Drainage area, based on regional criteria, can be used to approximate the location of the 1 cfs point on a stream. We believe that the prohibition in paragraph (k) is necessary to ensure that NWP 39 authorizes only activities with minimal adverse effects on the aquatic environment. This provision is consistent with the increased emphasis we are placing on the protection of open and flowing waters.

Several commenters objected to allowing project proponents to construct

their activities in phases. Numerous commenters said that NWP 39 should not be used with NWP 14 because it will authorize activities that exceed the acreage limit of NWP 39.

District engineers will review PCNs for phased construction projects to determine if those activities comply with the terms and conditions of the NWPs. District engineers will also review the PCNs for these activities to ensure that they result in minimal adverse effects on the aquatic environment. General Condition 15 states that when more than one NWP is used to authorize a single and complete project, that single and complete project is subject to the highest specified acreage limit of those NWPs. Therefore, when NWP 14 is combined with NWP 39 to authorize a single and complete project, the total project acreage limit will be ½ acre.

One commenter asked how a project proponent would know if NWP 40, as it was issued in 1996, was used to construct a farm building that was more than 500 feet from a waterbody, if that land was sold to build a residential, commercial, or institutional development on the land. One commenter objected to the restrictions relating the use of NWP 39 and NWP 40 on the same parcel, but another commenter supported these restrictions.

The limitations for the use of NWPs 39 and 40 on the same parcel apply only to those activities authorized by the NWPs issued today, because the previous version of NWP 40 authorized discharges of dredged or fill material into farmed wetlands for the construction of farm buildings. We are retaining the provisions limiting the use of NWPs 39 and 40 on the same parcel.

Several commenters objected to the subdivision provision in NWP 39, stating that it will allow the authorization of activities with more than minimal adverse effects on the aquatic environment. One commenter requested clarification whether the subdivision provision applies to all of the terms of NWP 39 or whether it only addresses the acreage limits for each parcel within the subdivision. This commenter also indicated that if the district engineer grants an exemption pursuant to the subdivision provision, then the landowner can use NWP 26 to authorize the development activity. Another commenter said that only NWP 29 should be used to authorize activities on individual lots within an exempted subdivision.

The notification requirements of the subdivision provision will ensure that NWP 39 will authorize only activities with minimal adverse effects on the aquatic environment. District engineers can assert discretionary authority if the proposed work will result in more than minimal adverse effects on the aquatic environment. The subdivision provision addresses only the acreage limits for the subdivision, or the individual parcels within that subdivision if an exemption has been granted by the district engineer. The subdivision provision does not keep NWP 26 in effect for those activities that have been granted an exemption by the district engineer. If an exemption has been granted, the activities on individual parcels must comply with the terms and conditions of NWP 39. We do not agree that activities on individual lots should be eligible only for NWP 29 if an exemption has been granted, because other types of buildings may be constructed on these lots, with minimal adverse effects on the aquatic environment.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For NWP 39 activities resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. Furthermore, General Condition 26 prohibits any above-grade fill under NWP 39 within regulatory floodways above the headwaters. NWP 39 is issued with the modifications discussed above.

40. Agricultural Activities: In the July 21, 1999, **Federal Register** notice, we proposed to modify NWP 40 to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to improve agricultural production.

A large number of commenters expressed opposition to the proposed modification of this NWP. Many commenters said that the use of this NWP will result in substantial losses of wetlands and some commenters stated that the activities authorized by this NWP will result in more than minimal adverse effects on the aquatic environment. Numerous commenters said that the proposed modification of NWP 40 violates the Clean Water Act because it authorizes discharges of dredged or fill material that result in the loss of agricultural wetlands. Some commenters stated that the proposed modification is unnecessary because on-going farming activities are exempt from Section 404 permit requirements. One commenter said that the proposed modification is contrary to other Federal programs, such as the Wetlands Reserve Program and the Conservation Reserve Program. One commenter indicated that the text of this NWP should reference the wetland conservation provisions of the ''Food Security Act of 1985, as amended.''

NRCS will review those activities authorized by paragraph (a) and district engineers will review most activities authorized by paragraphs (b), (c), and (d) to ensure that the activities authorized by this NWP do not result in more than minimal adverse effects on the aquatic environment. The use of this NWP will not result in substantial losses of wetlands. Compensatory mitigation will be required for most activities authorized by this NWP to offset losses of waters of the United States and ensure that the authorized work results in minimal adverse effects on the aquatic environment.

The modification of NWP 40 does not violate the Clean Water Act, because the Clean Water Act does not prohibit discharges of dredged or fill material into waters of the United States to increase agricultural production. The Clean Water Act merely requires a permit for such activities. The conversion of wetlands to increase agricultural production is not exempt from Section 404 permit requirements. The proposed modification of NWP 40 is not contrary to the Wetlands Reserve Program or the Conservation Reserve Program. We have modified the text of the NWP to refer to the ''Food Security Act of 1985, as amended.''

One commenter said that the proposed modification of NWP 40 should authorize activities in non-tidal wetlands adjacent to tidal waters to increase the utility of this NWP in coastal areas. Several commenters stated that this NWP should be restricted to frequently cropped wetlands. Many commenters stated that this NWP should not authorize activities in playas, prairie potholes, and vernal pools. Three commenters indicated that this NWP should not authorize activities within 100 feet of playas, prairie potholes, and vernal pools. Another commenter said that this NWP will authorize the destruction of streams.

We do not agree that this NWP should authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters. In addition, this NWP should not be restricted to frequently cropped wetlands. Division engineers can regionally condition paragraph (b) or (c) of this NWP to prohibit or limit its use in playas, prairie potholes, and vernal pools. This NWP does not authorize the destruction of streams. The only stream impacts authorized by this NWP are discharges of dredged or fill material into waters of the United States to relocate drainage ditches constructed in non-tidal streams.

One commenter stated that a separate NWP should be developed for the installation of drainage ditches or drainage tile. Another commenter asked if this NWP authorizes silvicultural or ranching activities.

This NWP can be used to authorize discharges of dredged or fill material into non-tidal wetlands to construct drainage ditches or install drainage tile, provided the work meets the terms and conditions of this NWP and does not result in the loss of greater than ½ acre of non-tidal waters of the United States. This NWP authorizes silvicultural and ranching activities, because they are considered agricultural activities.

One commenter opposed the proposed indexed acreage limit for this NWP and several commenters supported the use of an indexed acreage limit. One commenter said that the activities authorized by paragraphs (c) and (d) should be included in the indexed acreage limit for this NWP. Two commenters supported the maximum 2 acre limit. Many commenters said that this NWP should have a ¼ acre limit. Other commenters suggested ⅒, ⅓, and 1 acre limits. One commenter supported the 1 acre limit for discharges of dredged or fill material into playas, prairie potholes, and vernal pools. Other commenters said that the acreage limit for discharges into these types of waters should be lower, and one commenter recommended a ⅓ acre limit. Several commenters stated that this NWP should have a linear foot limit for stream impacts. Some commenters suggested a 250 linear foot limit and another commenter recommended a 500 linear foot limit.

Based upon our review of the comments received in response to the July 21, 1999, **Federal Register** notice, we have established a ½ acre limit for discharges of dredged or fill material into non-tidal wetlands (including playas, prairie potholes, and vernal pools) to increase agricultural production. This acreage limit will ensure that the activities authorized by this NWP result in minimal adverse effects on the aquatic environment. We have withdrawn the indexed acreage limit for discharges of dredged or fill material into playas, prairie potholes, and vernal pools to increase agricultural production. We have added a 300 linear foot limit for the relocation of existing drainage ditches constructed in non-tidal streams.

One commenter supported the use of farm tracts to identify single and complete projects under NWP 40. This commenter also said that using farm tracts to define single and complete projects for this NWP is problematic, especially when a farmer leases land to other farms. This commenter stated that landowners would need to request tract numbers and boundary determinations for certain areas, such as range land, where tract numbers or boundary determinations have not yet been designated. Several commenters indicated that the acreage limit for this NWP should be based on farms, not farm tracts. Some of these commenters said that basing the acreage limit on farm tracts will allow more than one use of this NWP for a single agricultural operation. One commenter remarked that the use farm tracts in this NWP does not satisfy the definition of independent utility because the majority of farm tracts are not economically self-supporting.

We maintain our position that single and complete projects for this NWP should be based on farm tracts, not farms. Utilizing farm tracts will make this NWP easier to implement for the regulated public, NRCS personnel, and Corps personnel. In addition, the use of farm tracts will avoid the difficulties associated with the leasing of farm tracts. Data from the Farm Service Agency shows that there is an average of 1.5 farm tracts per farm nationwide. Therefore, the use of farm tracts to determine single and complete projects will not result in substantial losses of wetlands. Since NRCS supports the use of farm tracts for this NWP and the national average is 1.5 farm tracts per farm, we cannot agree with the comment that the majority of farm tracts are not economically self-supporting.

Many commenters objected to the terms of paragraph (a) of the proposed modification of NWP 40, stating that the Corps, not NRCS, should review these activities and determine if they can be authorized by NWP 40. One commenter opposed paragraph (a), stating that it does not provide the district engineer with the opportunity to exercise discretionary authority. Two commenters said that the Clean Water Act does not allow the Corps to delegate portions of the Section 404 permit program to NRCS. One of these commenters also stated that there should be a Memorandum of Agreement between the Corps and NRCS to track the use of this NWP. Two commenters said that NRCS does not have the authority under the Clean Water Act to evaluate the indirect or cumulative impacts of activities authorized by this NWP. One commenter remarked that the provisions of paragraph (a) will increase the workload of District Conservationists at local NRCS offices. Many commenters objected to paragraph (a) because division engineers cannot impose regional conditions on this provision of NWP 40.

These terms and conditions of NWP 40, in conjunction with the requirements of NRCS, will ensure that the activities authorized by paragraph (a) will result in minimal adverse effects on the aquatic environment, without oversight by the Corps. The provisions of paragraph (a) do not delegate the Section 404 program to NRCS. The reporting requirements of subparagraph (a)(5) will allow district engineers to monitor the use of this NWP and assess cumulative adverse effects. The comments we received from NRCS do not indicate that the workload increase imposed on District Conservationists will be unmanageable. To assist in the effective implementation of paragraph (a), division engineers cannot impose regional conditions on this term of NWP 40.

One commenter supported the requirement for USDA program participants to be in compliance with the minimal effects criteria of NRCS. One commenter said that subparagraph (a)(1) of NWP 40 should include the terms ''categorical minimal effects exemption, minimal effect exemptions, and mitigation exemptions,'' which are more accurate than the proposed language. This commenter recommended that the phrase ''if required'' should be included in subparagraph (a)(5) of the proposed modification of NWP 40 because not all activities will require compensatory mitigation. One commenter said that mitigation requirements should be coordinated between NRCS and the Corps to ensure that the mitigation requirements of the Food Security Act and the Clean Water Act are satisfied.

We have modified the text of subparagraph (a)(1) to make it consistent with the terminology utilized in NRCS regulations. We also concur with the third comment in the previous paragraph, and have revised subparagraph (a)(4) accordingly. For

activities authorized by paragraph (a), the Corps will accept the compensatory mitigation requirements of NRCS.

One commenter suggested that NRCS should determine if proposed activities authorized by paragraph (a) will result in unacceptable impact to 100-year floodplains because NRCS must consider impacts to flood storage and flood flowage when determining whether an activity qualifies for a USDA exemption. This commenter also said that if proposed General Condition 27 is not modified to allow NRCS to determine the impacts to 100-year floodplains, then the text of NWP 40 should be revised to include the prohibitions imposed by this general condition.

Since we have modified the proposed General Condition 27 (now designated as General Condition 26) for fills within 100-year floodplains, we have added paragraph (e) to NWP 40. This paragraph states that the permittee must comply with General Condition 26 if the NWP 40 activity is in a 100-year floodplain identified by FEMA's Flood Insurance Rate Maps or FEMA-approved local floodplain maps. We believe that it is adequate to refer the permittee to General Condition 26, instead of incorporating the provisions of this general condition into the text of NWP 40. The Corps, as available, will identify the limits of headwaters for the purposes of General Condition 26.

One commenter said that the PCN threshold for this NWP should be ⅓ acre and another commenter stated that the PCN threshold should be ⅒ acre. A commenter said that the prospective permittee should not be required to disclose past use of NWP 40 with a NWP 40 PCN for additional discharges of dredged or fill material into waters of the United States on the property. Another commenter said that a mitigation plan should be submitted with all NWP 40 PCNs. One commenter said that the phrase ''if required'' should be included in paragraph (b)(5) because not all activities authorized by NWP 40 will require compensatory mitigation. Another commenter objected to paragraph (b) because it contains no provisions for the Corps to verify wetland determinations.

We have adopted a ⅒ acre PCN threshold for activities authorized by paragraph (b) of this NWP. There is no provision in NWP 40 that requires the permittee to notify the Corps of the past use of NWP 40. Subparagraph (b)(4) of NWP 40 requires the submission of a mitigation plan with the PCN. We do not agree with the fourth comment in the previous paragraph, because we are only requiring the submission of a compensatory mitigation proposal with the PCN. District engineers can determine, on a case-by-case basis, that compensatory mitigation is not necessary to ensure that the authorized activity results in minimal adverse effects on the aquatic environment. Verification of wetland determinations and wetland delineations on agricultural land that will remain in agricultural use is the responsibility of NRCS, not the Corps.

One commenter stated that there should be a separate NWP to authorize discharges of dredged or fill material into waters of the United States for the construction of farm buildings. Several commenters objected to this provision, stating that building pads for farm buildings can be constructed outside of waters of the United States. A commenter remarked that the terms for the construction of farm buildings should be the same as the terms for NWP 29. One commenter said that the use of farm buildings constructed near wetlands and streams will contaminate these waters.

We do not agree that a separate NWP for the construction of farm buildings is necessary. We have reduced the acreage limit from 1 acre to ½ acre to ensure that this NWP authorizes discharges of dredged or fill material for the construction of farm buildings that have minimal adverse effects on the aquatic environment. We disagree with the comment that all farm buildings can be constructed outside of wetlands. Farm buildings serve different purposes and are typically larger than single family residences. Therefore, farm buildings should not be subject to the same terms and conditions as NWP 29. The pollution of streams and other waters from agricultural operations are addressed by other Federal, state, and local programs.

Several commenters stated that this NWP should not authorize the relocation of streams or ditches. One commenter said that there should be a limit on the length of ditch that can be relocated, to ensure that the NWP authorizes only activities with minimal adverse effects. Another commenter indicated that the impacts due to ditch relocations should be included in the 2 acre limit for this NWP.

The relocation of drainage ditches is often necessary to increase agricultural production on the farm tract. We have imposed a 300 linear foot limit for the relocation of existing drainage ditches constructed in non-tidal streams. We do not agree that the relocation of drainage ditches constructed in non-tidal waters of the United States should be included in the ½ acre limit of paragraph (a) or (b) because these relocation activities typically do not result in a net loss of aquatic resource functions and values.

One commenter objected to the proposed NWP, stating that it treats USDA program participants and non-participants differently. Another commenter said that the terms and conditions of NWP 40 should not be established to provide equity between developers and agricultural producers, but instead should be based on activities that are similar in nature that have minimal adverse effects on the aquatic environment. One commenter stated that NWP 40 should be subject to the same terms and conditions as NWP 39.

The terms of paragraphs (a) and (b) do not treat USDA program participants and non-participants differently. These two groups are subject to the same acreage limits and mitigation requirements. The only differences between paragraphs (a) and (b) are the agencies reviewing the proposed work and the reporting requirement for USDA program participants. The terms of NWPs 39 and 40 are established to ensure that these NWPs authorize activities with minimal adverse effects on the aquatic environment. Both NWPs 39 and 40 are subject to the ½ acre limit, but different terms and conditions are necessary because these NWPs authorize different types of activities.

Two commenters expressed concern that NWP 40 will be used by land developers to prepare sites for future development by filling wetlands and keep the land in agricultural production for a few years, and then request authorization under NWP 39 for additional discharges of dredged or fill material into waters of the United States to construct a development. One commenter supported the provision proposed in the July 1, 1998, **Federal Register** notice that allowed the use of this NWP each time it was reissued. Another commenter opposed this NWP, indicating that it can be used repeatedly on a single farm over time. One commenter said that discharges of dredged or fill material into waters of the United States for the construction of compensatory mitigation sites should be calculated in the acreage loss of waters of the United States.

NWP 40 contains provisions that prevent land developers from filling wetlands on agricultural land to increase the amount of non-wetland area on the site for future developments. If NWP 40 was used to authorize discharges of dredged or fill material into non-tidal waters on the farm tract to increase agricultural production and the current landowner wants to use NWP 39 to authorize the construction of

a residential, commercial, or institutional development, the combined acreage loss of waters of the United States authorized by NWPs 39 and 40 cannot exceed ½ acre. NWP 40 cannot be used repeatedly on a single farm tract to exceed the ½ acre limit for a single and complete project. Discharges of dredged or fill material into waters of the United States to construct compensatory mitigation sites should not be calculated in the acreage loss of waters of the United States.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For NWP 40 activities resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. Furthermore, General Condition 26 prohibits any above-grade fill under NWP 40 within regulatory floodways above the headwaters. NWP 40 is reissued with the modifications discussed above.

41. Reshaping Existing Drainage Ditches: In the July 21, 1999, **Federal Register** notice, we proposed to issue an NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-section of drainage ditches constructed in these waters.

Two commenters opposed the issuance of this NWP if certain channelized streams are considered to be drainage ditches. One commenter said that these activities should be reviewed through the individual permit process. Another commenter stated that this NWP will be abused by landowners who want to reshape the banks of their drainage ditches under the guise of improving water quality.

The maintenance of drainage ditches that were constructed by channelizing streams may be eligible for the Section 404(f) exemption. The purpose of NWP 41 is to provide a general permit that authorizes the reshaping of existing serviceable drainage ditches constructed in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, in a manner that benefits the aquatic environment. This NWP does not authorize reshaping of drainage ditches that increases the area drained by the ditch. We do not agree that this NWP will be abused by landowners, because of the stringent terms of the NWP. Division engineers can revoke this NWP in areas where the reshaping of drainage ditches constructed in non-tidal waters of the United States results in more than minimal adverse effects on the aquatic environment, individually or cumulatively.

Several commenters said that NWP 41 is unnecessary, because these activities are authorized by NWP 3 or are exempt from Section 404 permit requirements. A commenter stated that the discussion of the Section 404(f) exemption for ditch maintenance in the July 21, 1999, **Federal Register** notice is inaccurate because it did not include the recapture provision of Section 404(f)(2). Another commenter indicated that if the intent of NWP 41 is to improve water quality, then these activities should be authorized by NWP 27.

NWP 3 does not authorize the reshaping of drainage ditches constructed in waters of the United States. Maintenance activities explicitly identified in Section 404(f) are exempt from permit requirements, subject to the recapture provisions of Section 404(f)(2). NWP 27 authorizes the restoration, enhancement, and creation of aquatic habitats, not the reshaping of drainage ditches.

One commenter said that this NWP should apply to all man-made ditches, whether or not they are currently serviceable, as long as the cropland draining to the ditch has not been abandoned. A commenter requested criteria that will be used to determine whether a particular ditch is currently serviceable. Another commenter recommended expanding the scope of this NWP to authorize ditch relocation. One commenter said that sidecasting into waters of the United States should not be authorized by this NWP. Another commenter suggested that this NWP should not authorize activities that involve the installation of concrete lining or other hard structures.

This NWP applies only to the reshaping of existing serviceable drainage ditches constructed in waters of the United States. It does not authorize the reconstruction of drainage ditches. We have replaced the word ''existing'' with the word ''currently'' in the first sentence of this NWP. For the purposes of NWP 41, the definition of the term ''currently serviceable'' is the same as the definition provided in NWP 3. This NWP does not authorize ditch relocation, because relocating a drainage ditch is likely to result in draining of areas that were not previously drained. We have modified NPW 41 to allow for the temporary sidecasting of material into waters of the United States. Material may be temporarily sidecast (up to three months) into waters of the United States, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary sidecasting not to exceed a total of 180 days, where appropriate. This NWP does not authorize discharges of dredged or fill material into waters of the United States to line drainage ditches with concrete or other hard structures.

Several commenters said that the scope of waters for this NWP should be expanded to include tidally influenced drainage ditches. One commenter stated that the text of this NWP is misleading because the Corps has no legal authority to regulate the reshaping of drainage ditches landward of the ordinary high water mark if there is no wetland hydrology. Another commenter recommended adding a provision to NWP 41 which states that the maintenance of existing drainage ditches to their original dimensions and configuration is exempt from Section 404 permit requirements.

We do not agree that this NWP should be expanded to authorize discharges of dredged or fill material into tidal waters of the United States or non-tidal wetlands adjacent to tidal waters. The text of NWP 41 clearly states that it authorizes discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. If the ditch reshaping activity does not involve discharges of dredged or fill material into waters of the United States, including wetlands, then the project proponent does not need a Section 404 permit. The text of this NWP includes a reference to the Corps regulations that address the Section 404(f) exemptions.

One commenter believes that the water quality benefits of the activities authorized by this NWP are doubtful and that the use of this NWP will increase the drainage of wetlands. Another commenter stated that the activities authorized by this NWP will prevent the development of woody vegetated buffers, which contradicts the goal of no net loss of wetlands and discourage stream restoration. Three commenters said that reshaping a drainage ditch will increase its

hydraulic capacity. One of these commenters indicated that the project proponent should be required to demonstrate that the proposed work will not increase the area drained by the ditch. Two commenters indicated that compensatory mitigation should be required for the activities authorized by this NWP because drainage ditches drain wetlands.

Drainage ditches can be reshaped to improve water quality, without increasing the area drained by those ditches. This NWP does not authorize ditch reshaping activities that expand the area drained by the ditch. The removal of woody vegetation next to the stream is often necessary to maintain or reshape the drainage ditch. We do not agree that it is necessary to require project proponents to provide documentation that demonstrates that the activity will not increase the area drained by the ditch because the work is limited to restoring the ditch to its original capacity. Compensatory mitigation should not be required for activities authorized by this NWP, because it does not authorize the drainage of additional wetlands.

Three commenters recommended a 500 linear foot limit on this NWP and one commenter suggested a 250 linear foot limit. One commenter said that there should not be a limit on this NWP if the activity does not involve sidecasting into waters of the United States. One commenter stated that the PCN threshold should be reduced to 250 linear feet. Two commenters indicated that a delineation of special aquatic sites should not be required for those activities that require notification.

We do not agree that a linear foot limit should be placed on this NWP, because it authorizes activities that typically benefit the aquatic environment. We are retaining NWP 41 on the list of NWPs that require the submission of a delineation of special aquatic sites with the PCN.

One commenter said that NWP 41 should be conditioned to require permittees to obtain certification for best management practices from NRCS. Another commenter stated that this NWP should include a condition prohibiting the construction of berms and levees that would impede overbank flow. One commenter said that this NWP should authorize the reconfiguration of improperly designed drainage ditches, with the submission of a notification that documents the need for reconfiguration, to minimize adverse effects due to headcutting and increases in sediment loads.

We do not agree that it is necessary to require permittees to obtain certification for best management practices from NRCS. General Condition 21 states that NWP activities cannot permanently restrict or impede the passage of normal or expected high flows. Temporarily sidecast material should be placed so that it does not impede overbank flows. No berms, levees, or other similar structures are authorized by NWP 41. The reconfiguration of improperly designed drainage ditches can be authorized by individual permits, regional general permits, or other NWPs.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. NWP 41 is issued with the modifications discussed above.

42. Recreational Facilities: In the July 21, 1999, **Federal Register** notice, we proposed to issue an NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of recreational facilities that are integrated into the existing landscape.

One commenter said that this NWP will authorize activities with more than minimal adverse effects on the aquatic environment and induce development of neighboring areas. One commenter stated that the word ''passive'' should be retained in the title of the NWP. One commenter noted that the word ''of'' should be replaced with the word ''or'' after the word ''construction'' in the first sentence. Two commenters said that this NWP should authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

The terms and conditions of this NWP, as well as the ability of division and district engineers to place regional and case-specific conditions on this NWP, will ensure that this NWP authorizes only activities with minimal adverse effects on the aquatic environment. We will not restore the word ''passive'' to the title of this NWP because it is an ambiguous term that does not provide any value to the NWP. We have replaced the word ''of'' with the word ''or'' in the first sentence of the NWP. The scope of applicable waters for this NWP is limited to ''non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters'' to ensure that this NWP authorizes only activities with minimal adverse effects on the aquatic environment.

Many commenters objected to including the construction and expansion of golf courses and the expansion of ski areas in the list of activities authorized by this NWP. One commenter stated that the improvement of ski areas should be authorized by this NWP, in addition to the expansion of these facilities. One commenter said that other types of recreational facilities should be authorized by this NWP if they do not result in substantial amounts of grading and filling and the adverse effects on the aquatic environment are minimal. This commenter indicated that ball fields should be authorized by this NWP. Another commenter said that impervious surfaces should be authorized in areas where they are required for stabilization or meeting access requirements for disabled persons. One commenter stated that the term ''substantial'' needs to be defined so that it is consistently implemented by district engineers.

As discussed in the July 21, 1999, **Federal Register** notice, NWP 42 authorizes the construction and expansion of golf courses and the expansion of ski areas that are integrated into the natural landscape. These types of recreational facilities can be constructed without substantial amounts of grading and filling. NWP 42 does not authorize the construction of new ski areas, but this NWP may authorize discharges of dredged or fill material into waters of the United States to improve existing ski areas, provided the activity meets the terms and conditions of this NWP.

This NWP does not authorize the construction or expansion of playing fields because these activities typically require substantial grading and filling to create level playing surfaces, as well as the installation of drainage systems. The construction or expansion of basketball courts, tennis courts, racetracks, stadiums, and areas involve the construction of substantial amounts of impervious surfaces and therefore are not authorized by this NWP. Recreational facilities not authorized by this NWP may be authorized by other NWPs, regional general permits, or individual permits.

This NWP does not authorize discharges of dredged or fill material into waters of the United States to stabilize areas within the recreational facility. NWP 13 may authorize bank stabilization activities associated with the recreational facility. Small amounts of impervious surface may be constructed in recreational facilities

authorized by this NWP to satisfy access requirements for disabled persons. District engineers will determine on a case-by-case basis whether the construction or expansion of a proposed recreational facility will result in substantial changes in preconstruction grades.

Two commenters supported the proposed 1 acre limit. Several commenters stated that the proposed acreage limit is too large. One commenter said that the acreage limit should be ½ acre and two commenters suggested a ⅓ acre limit. A commenter recommended a 100 linear foot limit for stream bed impacts and two commenters suggested a 250 linear foot limit for stream bed impacts.

To ensure that this NWP authorizes activities with minimal adverse effects on the aquatic environment, we have reduced the acreage limit to ½ acre and added a 300 linear foot limit for filling or excavating perennial or intermittent stream beds.

Two commenters said that this NWP should have the same PCN thresholds as NWP 39. Two commenters recommended a PCN threshold of ⅓ acre. One commenter supported the 500 linear foot PCN threshold for perennial and intermittent stream bed impacts. Three commenters stated that the PCN threshold for stream bed impacts should be reduced to 250 linear feet.

We have reduced the PCN threshold to 1/10 acre. Since we have added a 300 linear foot limit for stream bed impacts, we have deleted the 500 linear foot PCN threshold for perennial and intermittent stream bed impacts.

One commenter said that the phrases ''has low impact on the aquatic environment'' and ''consists primarily of open space that'' should be deleted from NWP 42 because they are confusing and will cause inconsistent implementation of this NWP. Several commenters indicated that a compensatory mitigation proposal to offset losses of waters of the United States should be required for all activities that require notification.

We have deleted these phrases from the text of NWP 42. We do not agree that it is necessary to require a compensatory mitigation proposal with the PCN, because of the types of recreational facilities authorized by this NWP.

Several commenters said that this NWP should not authorize discharges of dredged or fill material into wetlands for the construction of stables and sanitary facilities. One commenter stated that support facilities should be authorized by NWP 39. Another commenter remarked that support facilities should be constructed in uplands. One commenter said that restaurants and hotels should be authorized by this NWP because these facilities support the recreational facility. One commenter requested a definition of the term ''small support facilities.'' A commenter stated that the phrase ''reduced fertilizer use'' should be replaced with the term ''appropriate fertilizer use'' in the last paragraph of this NWP.

We maintain our position that this NWP should authorize small support facilities necessary for the operation of the recreational facility. Permittees are required to comply with General Condition 19, which states that the project proponent must avoid and minimize activities in waters of the United States on-site to the maximum extent practicable. We maintain our position that restaurants and hotels should not be authorized by this NWP. Restaurants and hotels can be authorized by other NWPs, such as NWP 39, regional general permits, or individual permits. District engineers will determine, for those activities that require notification, what constitutes a ''small'' support facility that is authorized by this NWP. We believe that the term ''reduced fertilizer use'' is more appropriate because the intent is to encourage permittees to utilize less fertilizer, which will reduce fertilizer loads on neighboring waterbodies.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For NWP 42 activities resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. NWP 42 is issued with the modifications discussed above.

43. Stormwater Management Facilities: In the July 21, 1999, **Federal Register** notice, we proposed to issue an NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction and maintenance of stormwater management (SWM) facilities.

Several commenters supported the issuance of this NWP and one commenter agreed that the construction of SWM facilities in wetlands is often necessary and that these SWM facilities are often more effective than SWM facilities constructed in uplands. Several commenters objected to the issuance of an NWP that authorizes the construction of SWM facilities in wetlands and other commenters opposed the issuance of a separate NWP for SWM facilities. One commenter said that this NWP should authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

We maintain the position discussed in the July 21, 1999, **Federal Register** notice that the construction of SWM facilities in waters of the United States is often necessary and may provide more protection to the aquatic environment. SWM facilities located in waters of the United States are often more effective than SWM facilities constructed in uplands, because storm runoff flows to streams and wetlands, making these areas more effective at trapping sediments and pollutants than upland areas. The local aquatic environment benefits from more efficient SWM facilities. Low value wetlands and low value ephemeral and intermittent streams may be the best places to locate SWM facilities, to reduce adverse effects to higher value waters by attenuating storm flows and preventing pollutants from further degrading those areas. Division engineers can regionally condition this NWP to prohibit its use in high value waters. For those activities that require notification, district engineers can add case-specific conditions to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority and require an individual permit for activities with more than minimal adverse effects. We do not agree that the scope of applicable waters for this NWP should be expanded to non-tidal wetlands adjacent to tidal waters, because this restriction is necessary to ensure that NWP 43 authorizes activities with minimal adverse effects on the aquatic environment.

Two commenters asked whether NWP 43 authorizes the construction of dams and detention basins to build new SWM facilities. Several commenters said that this NWP does not clearly identify the extent of the Corps regulatory jurisdiction concerning stormwater retention and detention facilities. One of these commenters stated that SWM

facilities constructed in uplands that contain wetland vegetation should not be considered jurisdictional wetlands. One commenter said that 40 CFR 131.10 prohibits states from designating waste transport or waste assimilation uses for any water of the United States. This commenter indicated that NWP 43 is contrary to this regulation because it authorizes the construction of SWM facilities in waters of the United States.

This NWP authorizes the construction of dams and detention basins for SWM facilities. However, this NWP does not authorize discharges of dredged or fill material into perennial streams for the construction of new SWM facilities. SWM facilities that were constructed in uplands and have not been abandoned are generally not considered waters of the United States, but district engineers reserve the right to determine on a case-by-case basis whether these areas are waters of the United States (see 51 FR 41217). The provisions of 40 CFR 131.10 do not prohibit discharges of dredged or fill material into waters of the United States for the construction or maintenance of SWM facilities. Stormwater is not categorized as waste.

One commenter supported the proposed 2 acre limit and several commenters recommended increasing the acreage limit to 3 acres for SWM facilities constructed by local governments or local flood control agencies. One commenter said that the 2 acre limit is too low but another commenter indicated that this acreage limit is too high. One commenter suggested a 1 acre limit for NWP 43 and another commenter recommended a ¼ acre limit. One commenter said that this NWP should have a 100 linear foot limit for stream bed impacts.

We have reduce the acreage limit for this NWP to ½ acre, to ensure that NWP 43 authorizes activities with minimal adverse effects on the aquatic environment. In addition, we have added a 300 linear foot limit for filling or excavating perennial or intermittent stream beds.

One commenter supported paragraph (b) of the proposed NWP (now designated as paragraph (c)), which states that NWP 43 does not authorize discharges of dredged or fill material into perennial streams for the construction of new SWM facilities. One commenter said that this NWP should not authorize discharges of dredged or fill material into any stream with perennial stream segments, because some arid regions of the country have perennial streams that occasionally become dry along certain reaches. Two commenters stated that this NWP should not authorize any discharges of dredged or fill material into streams to construct SWM facilities. One of these commenters expressed concern that the NWP would authorize activities with more than minimal cumulative adverse effects in urban areas and said that the conversion of streams to SWM ponds results in the creation of pollution sinks for urban storm runoff. One commenter said that this NWP should contain a condition that requires the maintenance of stream base flows.

We have retained this paragraph in NWP 43. In arid regions of the country, division engineers can regionally condition this NWP to prohibit or restrict its use in streams with intermittent or ephemeral stream segments, if those streams are high value waters. We do not agree that the prohibition in paragraph (c) should be extended to intermittent or ephemeral streams because we believe that, under the terms and conditions of this NWP, the construction of SWM facilities in these waters will result in minimal adverse effects on the aquatic environment. District engineers will monitor the use of this NWP to ensure that it does not authorize activities with more than minimal adverse effects on the aquatic environment, individually and cumulatively. Compliance with General Condition 21 will ensure that surface water flows will be maintained to the maximum extent practicable.

Two commenters objected to the proposed NWP because it does not contain limits for ephemeral stream impacts. These commenters suggested that this NWP should contain language stating that notification to the district engineer is not required for the construction or maintenance of SWM facilities constructed in ephemeral streams. These commenters also recommended that the text of this NWP explicitly state that SWM facilities that were originally constructed in ephemeral streams that have become perennial or intermittent streams are exempt from any permit requirements.

The ½ acre limit for this NWP adequately limits impacts to ephemeral streams. Division engineers can regionally condition this NWP to impose limits on discharges of dredged or fill material resulting in the loss of ephemeral stream bed, if there are specific concerns for the aquatic environment in those regions. Any discharges of dredged or fill material into waters of the United States associated with SWM facilities constructed in ephemeral streams that are considered waters of the United States requires a Corps permit.

Two commenters said that the ¼ acre PCN threshold is too small and two other commenters suggested a ⅓ acre PCN threshold. One commenter stated that the PCN threshold should be lower.

We have lowered the PCN threshold for this NWP to ⅒ acre, to ensure that district engineers have the opportunity to review all activities that have the potential to result in more than minimal adverse effects on the aquatic environment. We have removed the PCN threshold for activities causing the loss of greater than 500 linear feet of intermittent stream bed, since we have added a 300 linear foot limit for stream bed impacts.

One commenter asked if the PCN threshold applies to wetlands that were created as a result of the impoundment of stormwater. This commenter expressed concern that permittees would be required to mitigate for impacts to wetlands created by the construction of an SWM facility. This commenter said that these wetlands are often removed during routine maintenance activities and that requiring compensatory mitigation for the losses of these created wetlands would adversely affect the ability of permittees to effectively restore SWM facilities to their original design capacities.

Notification to the district engineer is required for discharges of dredged or fill material that result in the loss of greater than ⅒ acre of waters of the United States. District engineers will determine the appropriate amount of compensatory mitigation necessary to offset losses of waters of the United States to ensure that the adverse effects on the aquatic environment are minimal. Subparagraph (d)(3) clearly states that compensatory mitigation is not required for maintenance activities in designated maintenance areas of existing SWM facilities.

One commenter recommended the removal of subparagraph (c)(1) of the proposed NWP (now designated as subparagraph (d)(1)) because the maintenance of SWM facilities occurs on an unpredictable, episodic basis which is not conducive to a maintenance plan. Another commenter said that a compensatory mitigation proposal should not be required for all activities that require notification because the construction of some SWM facilities may result in the establishment of diverse, mature wetlands in areas that are not disturbed for extended amounts of time. This commenter suggested that the district engineer should have the ability to determine whether or not compensatory mitigation should be required for maintenance activities authorized by this NWP.

Subparagraph (d)(1) does not require maintenance on a timed schedule. The maintenance plan can include a statement that maintenance activities will be conducted as needed, to ensure that the SWM facility continues to function effectively. The maintenance plan should also identify the designated maintenance areas of the SWM facility. Subparagraph (d)(3) requires only the submission of a compensatory mitigation proposal with the PCN. Based on the review of a PCN, a district engineer can determine that compensatory mitigation is unnecessary because the adverse effects on the aquatic environment are minimal without compensatory mitigation or that they will be mitigated as wetlands are established in the SWM facility.

Two commenters said that the reference to ''watershed protection techniques'' should be deleted from paragraph (e) of the proposed NWP (now designated as paragraph (f)) or the term should be defined for the purposes of NWP 43. One commenter stated that the maintenance of existing SWM facilities should be exempted from the requirements of this paragraph. One commenter said that it is inappropriate for the Corps to characterize bioengineering methods as best management practices. This commenter indicated that bioengineering methods should be considered as mitigation and that the permittee should be given compensatory mitigation credits for utilizing bioengineering methods. One commenter indicated that there is a contradiction in the July 21, 1999, **Federal Register** notice because this notice states the district engineer can allow the establishment of mitigation credits in SWM facilities constructed with bioengineering techniques, but mitigation credits cannot be established in regularly maintained areas in SWM facilities. This commenter said that that mitigation credits should be limited to non-maintenance areas and that mitigation credits should not be allowed for the establishment of aquatic benches.

We have retained the phrase ''watershed protection techniques'' in paragraph (f) because these techniques are an important mechanism to ensure that NWP 43 authorizes activities with minimal adverse effects on the aquatic environment. We will not define this term because appropriate watershed protection techniques may vary in different areas of the country. For example, in many arid regions of the country it may be impractical to establish and maintain vegetated buffers next to streams. In general, the requirements of paragraph (f) apply to the construction of new SWM facilities, but best management practices should be used when conducting maintenance activities. Bioengineering techniques can be used to mitigate adverse effects on surface water quality. These techniques should be considered as best management practices in accordance with the definition in the ''Definitions'' section of the NWPs. District engineers can grant compensatory mitigation credits for bioengineering methods if those methods result in net gains in aquatic resource functions and values and are not located in areas within SWM facilities that require regular maintenance. Aquatic benches can provide compensatory mitigation, if those areas are not in designated maintenance areas of SWM facilities.

One commenter said the NWP 43 will authorize the construction of more than one stormwater management facility in a single watershed. This commenter stated that paragraph (e) of the proposed NWP (now designated as paragraph (f)) should contain a provision that requires the consideration of other SWM facilities located in the same watershed.

NWP 43 can be used to authorize more than one SWM facility in a particular watershed, provided each of those SWM facilities constitutes a separate single and complete project with independent utility. District engineers will monitor the use of this NWP to ensure that it does not authorize activities with more than minimal adverse effects on the aquatic environment, individually or cumulatively.

Several commenters said that maintenance of SWM facilities should be considered exempt from Corps permit requirements. One commenter stated that the requirements of paragraph (f) of the proposed NWP (now designated as paragraph (g)) are unnecessary because this activity can be authorized by NWP 3.

The maintenance of SWM facilities constructed in Section 404 waters is not exempt from Corps permit requirements. However, most maintenance does not require a Corps permit because the activity only involves incidental fallback of dredged material. NWP 43 authorizes the maintenance of existing SWM facilities that involves discharges of dredged or fill material into waters of the United States. NWP 43 does not authorize maintenance activities in Section 10 waters.

One commenter expressed concern about the provision in paragraph (g) of the proposed NWP (now designated as paragraph (h)). This commenter said that a developer could fill up to 3 acres of waters of the United States under NWP 39 and the local government could build an SWM facility for the development under NWP 43, which would exceed the total acreage for a single and complete project.

We believe that most SWM facilities constructed for a particular development will be built by the developer, not the local government. The developer may turn over the SWM facility to the local government for maintenance, but the construction of the SWM facility will be reviewed with the construction of the development. If NWP 39s and 43 are combined to authorize a single and complete project, the activity is subject to General Condition 15. There may be instances where a local government will construct a regional SWM facility that serves more than one development. These regional SWM facilities are considered to have independent utility from the serviced developments and may be authorized by NWP 43.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For NWP 43 activities resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. NWP 43 is issued with the modifications discussed above.

44. Mining Activities: In the July 21, 1999, **Federal Register** notice, we proposed to issue an NWP to authorize discharges of dredged or fill material into certain types of non-tidal waters of the United States for aggregate and hard rock/mineral mining activities.

A large number of commenters opposed the issuance of NWP 44. Numerous commenters said that NWP 44 is so restrictive that it will be of little use to the mining industry. These commenters also indicated that mining companies will have little incentive to design their projects to meet the terms and conditions of NWP 44 and that these companies will apply for individual permits. Many commenters

stated that the activities authorized by NWP 44 will result in more than minimal cumulative adverse effects on the aquatic environment, individually and cumulatively. Several commenters said that the Corps should issue separate NWPs for aggregate and hard rock/mineral mining activities. One of these commenters stated that aggregate and hard rock/mineral mining activities are distinct forms of mining and that issuing one NWP to authorize both of these activities violates the similar in nature requirement of Section 404(e) of the Clean Water Act.

The terms and conditions of this NWP will ensure that it authorizes only aggregate and hard rock/mineral mining activities with minimal adverse effects on the aquatic environment. Where there are specific concerns for the aquatic environment, division engineers can regionally condition this NWP to prohibit or limit its use in high value waters. Since notification to the district engineer is required for all activities authorized by this NWP, each proposed mining activity will be reviewed by district engineers to ensure that the work results in minimal adverse effects. We maintain our position that it is unnecessary to issue separate NWPs for aggregate and hard rock/mineral mining activities. These activities are sufficiently similar in nature to warrant the issuance of a single NWP.

One commenter asked what is meant by the term ''hard rock/mineral mining'' as used in the context of NWP 44. This commenter indicated that the district engineer will determine what constitutes mining for the purposes of this NWP on a case-by-case basis. This commenter also requested clarification whether NWP 44 authorizes all discharges of dredged or fill material into waters of the United States for hard rock/mineral mining activities or whether the Corps intends to limit this NWP to a certain subset of mining and related activities. One commenter asked for a definition of the term ''support activities'' as used in the context of this NWP. Another commenter said that this NWP should be expanded to authorize the mining of clay and dirt.

For purposes of this NWP, hard rock/mineral mining is the extraction of metalliferous ores from subsurface locations. NWP 44 authorizes discharges of dredged or fill material into certain categories of waters of the United States, as identified in the first paragraph of this NWP, for aggregate mining activities and hard rock/mineral mining activities. District engineers will determine, on a case-by-case basis, whether a particular mining activity is within the scope of this NWP. NWP 44 also authorizes fill for support facilities necessary for the mining operation. Support facilities authorized by this NWP include berms, access and haul roads, rail lines, dikes, road crossings, settling ponds and settling basins, ditches, stormwater and surface water management facilities, head cut prevention activities, sediment and erosion controls, and mechanized landclearing. In the July 21, 1999, **Federal Register** notice, we discussed the applicability of this NWP to clay mining activities and the extraction of soil to be used as fill material. NWP 44 does not authorize clay mining or the extraction of fill dirt from waters of the United States. These activities can be authorized by other NWPs, regional general permits, or individual permits.

Several commenters objected to the scope of applicable waters for this NWP, stating that it is too limited for most mining activities A number of commenters stated that hard rock/mineral mining activities should be authorized in ephemeral streams. One commenter said that NWP 44 should authorize mining activities in headwaters, including intermittent and perennial streams. Several commenters stated that there is no need to limit the use of this NWP to the upper portion of headwaters and eliminate the ability for miners to relocate or divert most headwater stream segments. Many commenters indicated that this NWP should not authorize any activities in streams. One commenter asked why NWP 44 does not authorize mining activities between lower perennial streams and the upper segments of headwater streams. One commenter said that the 1 cubic foot per second threshold should be replaced with ephemeral streams as a limit for stream bed impacts for aggregate mining activities. Several commenters said that the Cowardin definition of the term ''lower perennial stream'' should be included in the ''Definitions'' section of the NWPs.

The scope of applicable waters for NWP 44 is intended to ensure that this NWP authorizes only those mining activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. We do not agree that hard rock/mineral mining activities should be authorized in streams because these activities are more likely to result in more than minimal adverse effects on the aquatic environment, due to the processing methods used for this type of mining. NWP 44 authorizes aggregate mining activities in perennial and intermittent streams, provided those streams have an average annual flow of 1 cubic foot per second (cfs) or less. NWP 44 also authorizes aggregate mining activities in lower perennial streams. Limiting aggregate mining activities to these small streams will ensure that the NWP authorizes activities with minimal adverse effects on the aquatic environment. Streams segments located between lower perennial streams and the upper reaches of headwater streams often provide valuable aquatic habitat, such as fish spawning areas. We do not agree that the 1 cfs threshold should be replaced with ephemeral streams for aggregate mining activities in headwaters. In the last paragraph of this NWP, we have incorporated a modified version of the Cowardin definition of the term ''lower perennial riverine subsystem'' to clarify where aggregate mining activities in lower perennial streams are authorized. We have also replaced the word ''and'' with the term ''and/or'' between parts (ii) and (iii) of the introductory paragraph to clarify that a particular mining activity authorized by NWP 44 can occur in any or all of the specified waters.

Several commenters stated that the proposed 2 acre limit for NWP 44 is too low. Numerous commenters suggested that this NWP should have a higher, indexed acreage limit. Three commenters recommended a 3 acre limit and another commenter said that impacts to lower perennial streams, isolated wetlands, and ephemeral streams should be limited to 1 acre. One commenter stated that this NWP should have a higher acreage limit because other Federal and state programs that address hard rock/mineral mining activities require measures to minimize impacts to waters of the United States. One commenter suggested that the Corps impose a linear limit on perennial and intermittent stream bed impacts. Another commenter recommended a 500 linear foot limit for stream bed impacts.

To ensure that this NWP authorizes activities with minimal adverse effects on the aquatic environment, we have reduced the acreage limit of NWP 44 to ½ acre. We do not agree that this NWP should have an indexed acreage limit. Since this NWP has applicability nationwide, it would be impractical to utilize state requirements for mining activities, because their requirements are likely to vary considerably between geographic areas. This NWP is limited to small stream segments; therefore it is unnecessary to impose a linear limit on stream bed impacts. However, division engineers can regionally condition this NWP to further limit stream impacts. In addition, notification is required for all activities authorized by this NWP,

which will allow district engineers to review proposed stream impacts on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment.

Two commenters objected to requiring PCNs for all activities authorized by this NWP. One commenter suggested a ⅓ acre PCN threshold. Several commenters stated that the Corps does not have the authority to review reclamation plans and the requirement to submit reclamation plans with the PCN should be removed.

We believe that it is necessary to require notification for all activities authorized by this NWP, to ensure that the NWP authorizes activities with minimal individual and cumulative adverse effects on the aquatic environment. As discussed in the July 21, 1999, **Federal Register** notice, the requirement for submission of a reclamation plan with the PCN is not intended to supersede other Federal or State requirements. The district engineer will not require reclamation *per se,* but will review the reclamation plan to determine if compensatory mitigation is required to offset losses of waters of the United States and ensure that the individual or cumulative adverse effects of the mining activity on the aquatic environment are minimal. If there are no Federal or State requirements for a reclamation plan for a particular mining activity, the applicant should state that fact in the PCN. The District Engineer may require compensatory mitigation for that activity to ensure that the adverse effects on the aquatic environment are minimal. If the reclamation plan required by Federal or state law adequately addresses compensation for losses of waters of the United States, then the District Engineer will not require additional compensatory mitigation, unless there are additional concerns for the aquatic environment.

Several commenters asked whether paragraph (i) of the proposed NWP (now designated as paragraph (h)) applies only to hard rock/mineral mining activities because of the processes involved in mineral extraction. Some of these commenters indicated that the text of this paragraph implies that the 200 foot setback applies to both aggregate and hard rock/mineral mining activities. A number of commenters said that the Corps does not have the authority to prohibit beneficiation and mineral processing within 200 feet of the ordinary high water mark (OHWM) of open waters. One commenter asked if the 200 foot setback is necessary because NWP 44 does not authorize discharges of dredged or fill material into open waters of the United States for hard rock/mineral mining activities.

The requirements of paragraph (h) of the proposed NWP 44, apply only to hard rock/mineral mining activities. We have inserted the phrase ''for hard rock/mineral mining activities'' into the text of paragraph (h) to clarify that the 200 foot setback applies only to beneficiation and mineral processing associated with hard rock/mineral mining activities. In the mining industry, the term ''beneficiation'' applies solely to mineral ore processing. We have the authority to condition NWP 44 to prohibit beneficiation and mineral processing within 200 feet of the OHWM of open waters because this requirement is necessary to ensure that the NWP authorizes activities with minimal adverse effects on the aquatic environment. Project proponents conducting hard rock/mineral mining activities in waters of the United States who want to conduct beneficiation and mineral processing within 200 feet of the OHWM of open waters can request another form of DA permit for those activities. The 200 foot setback required for beneficiation and mineral processing activities is necessary to protect water quality.

We have also modified paragraph (i) (paragraph (j) of the proposed NWP) to clarify that the district engineer can require modifications to the water quality management plan for the mining activity to ensure that adverse effects to water quality are minimal. In addition, we have modified paragraph (k) (formerly paragraph (l)) to clarify what constitutes a single and complete mining activity. In paragraph (l) (formerly paragraph (m)), we have changed the first item to require the notification to include a description of waters of the United States adversely affected by the proposed work.

Several commenters objected to the provision in the last paragraph of NWP 44 that prohibits hard rock/mineral mining within 100 feet of the OHWM of headwater streams. Another commenter said that this NWP should contain depth limits for pits because large pits could be constructed under this NWP. One commenter suggested adding a provision to NWP 44 that requires the permittee to fully reclaim or restore the mined site before commencing mining activities on another site in the same stream segment.

The prohibition against hard rock/mineral mining activities in waters of the United States within 100 feet of the OHWM of headwater streams is necessary to ensure that these mining activities result in minimal adverse effects on headwater streams. It is unnecessary to add a depth limit for mining pits because the ½ acre limit and the terms and conditions of NWP 44 provide adequate protection of the aquatic environment. We do not agree that it is necessary to require permittees to fully reclaim or restore the mined site before conducting mining activities on other sites because the NWP regulations concerning single and complete projects already adequately address multiple mining activities.

Several commenters requested further explanation of the proposed ''clarification of jurisdiction'' for mining operations that was provided in the preamble of the July 21, 1999, **Federal Register** notice. These commenters asked for definitions of the terms ''cessation of operations'' and ''abandonment.'' Two commenters said that the ''clarification of jurisdiction'' must clearly state that wetlands, ponds, and other waterbodies will not be considered ''waters of the United States'' until bond release. One commenter objected to changing the 15 year term proposed in the preamble to the July 1, 1998, **Federal Register** notice to a 5 year term because mining is a cyclical industry and shutdowns of greater than 5 years are not uncommon.

One commenter stated that the ''clarification of jurisdiction'' statement is inconsistent with the effluent limitation guidelines at 40 CFR part 440. This commenter said that pit lakes should be regulated as waters of the United States, even though the mining site has not been reclaimed. This commenter expressed concern that pit lakes would not be considered waters of the United States even if the mining operation ceased years ago. In addition, this commenter indicated that the construction of pit lakes would does not comply with former paragraph (f) (now designated as paragraph (e)) of the proposed NWP and General Condition 21.

As a result of our review of the comments addressing the proposed ''clarification of jurisdiction'' we have decided to withdraw the proposed guidance. District engineers will determine, on a case-by-case basis, whether a specific mined area has been abandoned. In most cases, a mining site where no construction, mining, excavation, processing, and/or reclamation activities have occurred during the last 10 years would be considered abandoned, at the district engineer's discretion. Wetlands and waterbodies within an abandoned mined area would be considered ''waters of the United States'' if those

areas meet the criteria at 33 CFR part 328.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For NWP 44 activities resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. NWP 44 is issued with the modifications discussed above.

IV. Comments and Responses on Nationwide Permit General Conditions

In the July 21, 1999, **Federal Register** notice, the Corps announced its decision to combine the NWP General Conditions with the Section 404 Only conditions. Two commenters supported this change. In the July 21, 1999, **Federal Register** notice, the Corps proposed to modify nine NWP general conditions and add three new NWP conditions. In response to that **Federal Register** notice, we received many comments on specific NWP general conditions.

The general conditions in this **Federal Register** notice will apply to all of the NWPs, including the NWPs published in the December 13, 1996, **Federal Register** notice, unless a particular general condition applies only to specific NWPs listed in that general condition. The general conditions published today will become effective on June 5, 2000.

4. Aquatic Life Movements: In the July 21, 1999, **Federal Register** notice, we proposed to modify this general condition by adding a requirement for culverts to be installed to maintain low flow conditions.

One commenter stated that there are situations, such as stream channels with bedrock substrate, where culverts cannot be installed below grade to maintain low flows. This commenter requested that the Corps remove the requirement to install culverts to maintain low flows. Another commenter asked the Corps to remove the word ''substantially'' from this general condition because it imposes a threshold that is too high for activities that result in minimal adverse effects on the aquatic environment.

We do not agree that it is necessary to add an exclusion for stream beds that consist solely of bedrock. Road crossings in these streams can be constructed through other means, such as bridges or fords, that allow low flows to pass through the crossing. It is important to maintain low flow conditions to minimize disruptions to movements of aquatic organisms.

We have retained the word ''substantially'' in the text of this general condition because the removal of this word would change the requirement from ''minimal adverse effect'' to ''no adverse effect.'' We recognize that most work in waters of the United States will result in some disruption in the movement of aquatic organisms through those waters. District engineers will determine, for those activities that require notification, if the disruption of aquatic life movements is more than minimal and either add conditions to the NWP to ensure that the adverse effects are minimal or exercise discretionary authority and require an individual permit. This general condition is adopted as proposed.

7. Wild and Scenic Rivers: In the July 21, 1999, **Federal Register** notice, we did not propose any changes to this general condition. One commenter objected to the inclusion of ''study rivers'' in the text of this general condition.

We will retain ''study rivers'' in this general condition because study rivers are afforded the same protections as designated Wild and Scenic Rivers, while they are in study status. This general condition is retained without change.

9. Water Quality: The draft modification of General Condition 9 that was published in the July 21, 1999, **Federal Register** notice required permittees to develop and implement water quality management plans for activities authorized by NWPs 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44, if such a plan is not required by the state or Tribal Section 401 water quality certification. The draft modification of this general condition also required the establishment and maintenance of vegetated buffers next to open waters, such as streams.

To clarify the requirements of General Condition 9, we have divided this general condition into two paragraphs. Paragraph (a) discusses the requirement for individual water quality certifications. Paragraph (b) addresses the requirement for water quality management plans, including vegetated buffers.

Many commenters objected to the requirement for a water quality management plan, stating that the Corps lacks the statutory authority to require such a plan. A large number of commenters said that this requirement is duplicative of existing programs, such as state or Tribal water quality certification (WQC) and National Pollutant Discharge Elimination System programs. Several commenters stated that the Corps does not have the authority to determine whether a particular state or Tribal program adequately addresses water quality. Two commenters remarked that the Corps cannot override a state's WQC decision. Several commenters said that the proposed modification of General Condition 9 is not consistent with 33 CFR 320.4(d), which states that: ''[c]ertification of compliance with applicable effluent limitations and water quality standards required under provisions of section 401 of the Clean Water Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration.'' A number of commenters said that the Corps does not have the expertise to assess the effectiveness of water quality management plans or stormwater management plans for particular activities. One commenter asked for a definition of the term ''water quality management plan.''

Two commenters objected to the proposed modification of General Condition 9 because it requires stormwater management plans, even if those plans are not required by state or local governments. One commenter supported the statement in the July 21, 1999, **Federal Register** notice that a water quality management plan is not required if water quality issues are adequately addressed by state or local governments. One commenter objected to a statement in the July 21, 1999, **Federal Register** notice that a water quality management plan is not required for activities that have minimal adverse effects on local water quality. This commenter said that this statement is illogical because the NWPs can authorize only activities that have minimal adverse effects on the aquatic environment. Several commenters agreed that a water quality management plan should not be required for activities that have minimal adverse effects and requested that the Corps add

appropriate language to General Condition 9 because the draft general condition published in the July 21, 1999, **Federal Register** notice does not provide that flexibility. Several commenters stated that the requirement for water quality management plans will substantially increase costs for local governments and the regulated public. One commenter suggested that the Corps should rely on standard best management practices to protect water quality, instead of requiring case-specific water quality management plans.

A goal of the Clean Water Act, as stated in section 101 of the Act, is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. We maintain our position that the requirement for a water quality management plan for certain NWPs is necessary to ensure that activities authorized by those NWPs do not result in more than minimal adverse effects to water quality. We can require water quality management plans through our statutory authority under section 404 of the Clean Water Act, because the goal stated in section 101 applies to all sections of the Clean Water Act.

A water quality management plan is a mechanism to ensure that the activity authorized by NWP causes only minimal adverse effects on water quality. It can include stormwater management techniques and vegetated buffers next to open waters to protect water quality. The terms of General Condition 9 are not intended to replace existing state or Tribal section 401 requirements. In regions with strong water quality programs, district engineers will defer to state, Tribal, and local requirements and will not require water quality management plans as special conditions of NWP authorizations. If the 401 agency or other state or local agency does not require adequate measures to protect downstream water quality, we have the authority to require measures, including the construction of stormwater management facilities or the establishment of vegetated buffers next to open waters, that will minimize adverse effects to water quality.

If a district engineer determines that a water quality management plan is unnecessary because the authorized work will result in minimal adverse effects on water quality, then a water quality management plan is not required. For example, the district engineer may determine that a water quality management plan is not required for an activity in a watershed that is not substantially developed. In addition, a water quality management plan is not necessary for activities that are serviced by a regional stormwater management system. We have modified the first sentence of paragraph (b) by replacing the phrase ''provide for protection of aquatic resources'' with the phrase ''will ensure that the authorized work does not result in more than minimal degradation of water quality'' to clarify why a water quality management plan may be required by the district engineer.

We have also modified the second sentence of paragraph (b) by replacing the word ''project'' with the phrase ''water quality management plan.'' This clarifies that stormwater management is a component of the water quality management plan. If the district engineer determines that a water quality management plan is not required because a specific activity will have minimal adverse effects on water quality, then stormwater management methods are not necessary if they are not required by state or local governments.

We recognize that the development and implementation of a water quality management plan may increase costs to the regulated public. It is important to note that the purpose of the water quality management plan is to ensure that the authorized work results in minimal adverse effects on the aquatic environment, especially water quality. In most cases, the requirements of the Section 401 water quality certification and state or local stormwater management requirements will adequately address these issues. These state and local requirements already incur costs on project proponents and we do not agree that the requirements of General Condition 9 will impose substantial additional costs. Since site conditions are extremely variable between geographic regions of the country, we do not agree that generic best management practices are a better approach to address water quality concerns.

Several commenters objected to the requirements of General Condition 9, because the Corps does not define what constitutes a ''strong'' state water quality program. These commenters said that this requirement would confuse the regulated public because they cannot know when a water quality management plan will be required by the Corps for a particular NWP activity. Two commenters recommended that the Corps add language to General Condition 9 stating that water quality management plans will not be required in states with strong water quality programs. A commenter objected to the proposed modification of General Condition 9 because a district engineer may require modifications that conflict with the requirements of a state-issued WQC. Another commenter said that the Corps should coordinate water quality management requirements with state or local authorities, which would reduce redundancy and assist in enforcement.

We cannot define, at a national level, what constitutes a strong state water quality program. Corps districts can make a programmatic determination that a particular state, Tribe, or local government has a strong water quality program and therefore the Corps would not require project-specific water quality management plans in those jurisdictions. Where these programmatic determinations have not been made, district engineers will determine, on a case-by-case basis, when water quality management plans are necessary. A water quality management plan for a particular activity may be required as a special condition to the NWP authorization, whereby the permittee would submit the specifics of the water quality management plan to the district engineer prior to starting the work. We do not agree that it is necessary to explicitly state in the text of General Condition 9 that water quality management plans will not be required in states with strong water quality programs because this issue is adequately addressed in the preamble.

It is unlikely that a district engineer will request modifications to a particular activity that conflicts with WQC requirements, although the district engineer may require additional measures that are more stringent than the WQC conditions. We encourage district engineers to coordinate water quality management requirements with state and local authorities, to effectively implement the provisions of General Condition 9.

One commenter suggested that the Corps add language to this general condition that explains that the standard to be achieved is ''minimal'' degradation, not ''no'' degradation of water quality. This commenter cited the requirement of minimal degradation that was discussed in the preamble in the July 21, 1999, **Federal Register** notice. Two commenters objected to the proposed modification of General Condition 9 because the Corps has not defined what constitutes acceptable ''minimal degradation to water quality'' or ''minimal adverse effects to water quality.''

General Condition 9 does not contain a ''no degradation'' standard. General Condition 9 requires methods to minimize degradation of downstream aquatic habitats. We cannot provide

national definitions of the terms ''minimal degradation'' or ''minimal adverse effects'' to water quality because aquatic systems vary considerably across the country. District engineers will utilize their knowledge of local aquatic resources to make these determinations.

Several commenters requested that the Corps add language to this general condition that states that the requirements of General Condition 9 apply only to activities that result in discharges of dredged or fill material into waters of the United States, not to activities in uplands. These commenters cited the example in the preamble to the July 21, 1999, **Federal Register** notice, which indicated that the water quality management plan does not apply to the entire upland site if only a small amount of waters of the United States are filled to provide access to an upland development site. Two commenters stated that the Corps needs to provide a definition of the term ''project'' as it is used in the context of this general condition, because the general condition requires the establishment and maintenance of vegetated buffers if the activity occurs in the vicinity of open waters. These commenters asserted that the Corps cannot require stormwater management facilities or vegetated buffers to offset adverse effects caused by activities outside of waters of the United States.

The requirements for water quality management plans, including vegetated buffers next to open waters, apply only to those NWP activities that involve discharges of dredged or fill material into waters of the United States. Water quality management plans are required only for those NWPs listed in paragraph (b). We have also modified this general condition to state that vegetated buffers next to open waters are an important component of the water quality management plan. We have included a reference to General Condition 19, which contains the vegetated buffer requirements for the NWPs, in General Condition 9.

The requirement for a water quality management plan does not apply to activities in uplands, if the discharge of dredged or fill material into waters of the United States constitutes only a small portion of the entire activity. In this situation, if a water quality management plan is necessary to ensure that the activity in waters of the United States causes only minimal degradation of water quality, the water quality management plan would address only the specific activity that results in discharges or dredged or fill material into waters of the United States. However, if a large proportion of the project area is comprised of waters of the United States, then the water quality management plan should consider those upland areas within the project area to ensure that the overall activity will result in minimal adverse effects to water quality. Since the applicable area for the water quality management plan depends on the proportion of the project area that is composed of waters of the United States, we cannot provide a definition of the term ''project'' for the purposes of this general condition.

A commenter requested that the Corps specify the information that should be included in a water quality management plan. One commenter stated that the general condition should include a qualitative assessment procedure. Several commenters stated that water quality management requirements must be directly related to an identifiable water quality concern that is caused by the authorized discharge of dredged or fill material into waters of the United States. A commenter recommended adding a statement to this general condition explaining that water quality mitigation will be required when necessary to address site-specific water quality concerns and that the required mitigation will be accomplished through the most cost-effective method to address those concerns. Several commenters suggested that the Corps add a definition of the term ''practicable'' as it is used in the context of this general condition.

We cannot specify the components of a water quality management plan because these requirements will vary across the country. In general, stormwater management techniques and vegetated buffers next to open waters can be components of a water quality management plan. The language of General Condition 9 is intended to allow flexibility and minimize the amount of information necessary to determine compliance with its requirements. We cannot include a qualitative assessment procedure in the text of the general condition because of the variability in aquatic resources across the country. District engineers have their own criteria for assessing impacts to water quality, based on local conditions. District engineers will use their judgement to qualitatively determine if a particular activity complies with this general condition and will not require extensive analyses or reviews. Detailed studies are not required. We contend that these assessments should be left to the judgement of district engineers and will not establish a national assessment procedure. Water quality management requirements will be directly related to the activity authorized by NWP, to ensure that the authorized activity results in minimal adverse effects on local water quality.

Water quality management techniques must be practicable and capable of being accomplished by the permittee. For the purposes of General Condition 9, the definition of the term ''practicable'' is the same as the definition in the first sentence of paragraph (a) of General Condition 19. Measures required by district engineers to ensure that activities authorized by NWPs do not result in more than minimal adverse effects to water quality must be practicable, while allowing the proposed work to accomplish the overall project purpose. For example, the establishment and maintenance of vegetated buffers next to open waters on the project site will help protect water quality, but the width of those vegetated buffers must not reduce the amount of developable land on the project site to the extent that the proposed work is no longer technologically or economically viable.

One commenter recommended expanding the water quality management plan requirement to NWPs 3, 7, 8, 21, 23, 29, and 33. One commenter indicated that water quality management plans should not be required for NWP 44 activities because such plans are already required for hard rock/mineral mining operations. One commenter suggested waiving the water quality management plan requirement for discharges of dredged or fill material into ephemeral streams. One commenter stated that the requirement for stormwater management should apply only to activities that impact more than 4 acres of land.

We do not agree that water quality management plans should be required for activities authorized by NWPs 3, 7, 8, 21, 23, 29, and 33. We addressed the applicability of this general condition to NWP 21 in the preamble of the July 21, 1999, **Federal Register** notice and have not changed our position on this issue. The other NWPs listed in the first sentence of the previous paragraph authorize activities that typically have minor impacts on water quality. Even though other laws or regulations require water quality management plans for hard rock/mineral mining activities, we are not aware of a similar requirement for aggregate mining activities. Therefore, we do not agree that NWP 44 should be removed from the list of applicable NWPs. District engineers can determine, on a case-by-case basis, that water quality management plans are not required for activities involving

discharges of dredged or fill material into ephemeral streams. We do not agree that there should be a minimum project size to determine when stormwater management facilities are necessary.

Numerous commenters addressed the vegetated buffer requirement in the proposed modification of this general condition. Two commenters requested clarification whether the establishment and maintenance of vegetated buffers are required for all NWPs or only the NWPs listed in the second sentence of the proposed modification of General Condition 9. Two commenters said that vegetated buffers should not be required under all circumstances and that district engineers should use their discretion on a case-by-case basis. Several commenters recommended the removal of the vegetated buffer requirement from this general condition. Two commenters stated that vegetated buffers should be required only to address site-specific water quality concerns when the establishment and maintenance of vegetated buffers is practicable.

For the purposes of General Condition 9, vegetated buffers should be an important component of a water quality management plan. The vegetated buffer requirements for the NWPs are discussed in paragraph (b) of General Condition 19. If there are not any open waters on the project site, then vegetated buffers are not required. In addition, vegetated buffers are not required for Section 404 activities that result only in minimal adverse effects to water quality. District engineers will determine, on a case-by-case basis, when vegetated buffers are necessary to ensure that the authorized work results only in minimal adverse effects. The use of vegetated buffers in the NWP program is discussed in more detail in a previous section of this **Federal Register** notice.

Several commenters requested that the Corps clarify what is meant by the phrase ''in the vicinity'' of an open waterbody as it relates to the vegetated buffer requirement. Two commenters recommended that the Corps replace ''vicinity'' with ''contiguous'' to more clearly establish a direct relationship between the vegetated buffer requirement and the impacts caused by the authorized work. Two commenters said that the phrase ''to the maximum extent practicable'' needs to be defined for the purposes of the vegetated buffer requirement.

The term ''in the vicinity'' as used in the context of this general condition, means the parcel where the activity is located. If there are not any open waters on the project site, then vegetated buffers are not required. We have replaced the word ''adjacent'' with the word ''next'' to clarify that the vegetated buffer is to be established and maintained on land next to the open waterbody. We do not agree that the word ''vicinity'' should be replaced with ''contiguous'' because the requirement for vegetated buffers applies only to open waters on the project site. We have removed the phrase ''to the maximum extent practicable'' as it was used in the context of the vegetated buffer requirement in the proposed general condition. This general condition is adopted with the modifications discussed above.

11. Endangered Species: In the July 21, 1999, **Federal Register** notice, we proposed to modify this general condition by adding a requirement for the prospective permittee to submit, with the notification, the name(s) of the endangered or threatened species that may be affected by the proposed work or utilize designated critical habitat that may be affected by the proposed work.

One commenter objected to the requirement for prospective permittees to notify the Corps if there may be threatened or endangered species in the vicinity of the proposed activity. Another commenter objected to the requirement for applicants to notify the Corps for any activity that will occur in designated critical habitat. A commenter stated that the requirement to notify the district engineer if listed species or critical habitat may be affected by the proposed activity should apply to both Federal and non-Federal applicants. Two commenters opposed the notification requirement, stating that project proponents cannot know if their projects are located in designated critical habitat. Several commenters stated that the Corps is responsible as the lead Federal agency for compliance with section 7 of the Endangered Species Act (ESA) and that the Corps cannot delegate to the prospective permittee the determination whether a listed species or their critical habitat would be affected by the proposed work.

The notification requirements for General Condition 11 are necessary to ensure that activities authorized by NWPs comply with the requirements of ESA. Federal permittees are required to conduct Section 7 ESA consultation directly with either the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), depending on which species may be affected by the proposed work. Prospective permittees should contact the FWS or NMFS to determine if their activities may affect Federally-listed endangered or threatened species or destroy or adversely modify designated critical habitat. We recognize that we are responsible for determining whether an activity is likely to jeopardize the continued existence of a threatened or endangered species or whether an activity will adversely modify or destroy designated critical habitat, but we cannot require permittees to submit notifications for all NWP activities so that we can determine compliance with ESA. Division engineers can regionally condition the NWPs to require notification for NWP activities in known locations of Federally-listed endangered or threatened species and their designated critical habitat.

One commenter suggested that a specific distance should be used to define the phrase ''in the vicinity'' as it is used in this general condition. Another commenter said that the Corps needs to define what constitutes ''affecting critical habitat'' as it applies to the NWPs. One commenter stated that the word ''destroy'' should be defined or deleted from this general condition. A commenter stated that any activity that may affect a Federally-listed endangered or threatened species or its critical habitat must be reviewed by the FWS. Another commenter said that individual permits should be required for activities that may affect endangered or threatened species or their critical habitat.

We do not agree that a specific distance should be established to define the term ''vicinity'' because the area that constitutes the ''vicinity'' varies from species to species. Activities in waters of the United States within critical habitat have the potential to destroy or adversely modify that critical habitat and should be reviewed by the Corps to ensure compliance with ESA. The phrase ''destruction or adverse modification'' is defined at 50 CFR 402.02 and this definition applies to the phrase ''destroy or adversely modify'' that is found in General Condition 11. We will consult with FWS and NMFS for those activities that may affect or jeopardize Federally-listed endangered or threatened species or may destroy or adversely modify the designated critical habitat of those species. We do not agree that all activities that may affect endangered or threatened species or their critical habitat should be reviewed under the individual permit process because these activities can often be authorized by NWPs in compliance with ESA.

As a consequence of the NWP/General Permit Programmatic ESA Section 7 consultation, district engineers will develop Standard Local Operating Procedures for Endangered Species and

may develop other procedures to ensure that the NWPs and general permits will comply with the ESA. In addition, as part of this process, the Corps may need to adopt regional conditions for endangered species. To ensure that these conditions and procedures are properly coordinated, the decision authority for adding regional conditions for endangered species has been delegated to the district engineer in General Condition 11. This general condition is adopted with the modifications discussed above.

12. Historic Properties: In the July 21, 1999, **Federal Register** notice, we did not propose any changes to this general condition. One commenter objected to requiring compliance with the National Historic Preservation Act (NHPA) for activities authorized by NWPs. Another commenter opposed the notification requirement of General Condition 12 and asked how a permittee would know if his or her activity will affect historic properties. One commenter stated that the requirement to notify the district engineer if eligible cultural resources may be affected by a proposed activity should apply to both Federal and non-Federal applicants. A commenter said that individual permits should be required for all activities that may affect eligible cultural resources. One commenter indicated that the Corps should not require extensive documentation from an applicant demonstrating compliance with the NHPA.

All activities that require a Federal license (including NWPs) must comply with the NHPA. A prospective permittee can contact the local State Historic Preservation Officer to determine if the proposed work will affect known historic properties. Both Federal and non-Federal permittees are required to notify district engineers when authorized activities may affect listed or eligible historic properties. We do not agree that all activities that may affect cultural resources should be reviewed under the individual permit process because these activities can often be authorized by NWPs in compliance with the NHPA. The Corps requires the minimum documentation necessary to ensure compliance with the NHPA. This general condition is retained without change.

13. Notification: In the July 21, 1999, **Federal Register** notice, we proposed to change the 30 day PCN review period to 45 days, and include a requirement for district engineers to determine whether a PCN is complete within 30 days of the date of receipt.

Two commenters supported the proposed changes to the PCN review period. Many commenters objected to the proposed changes, stating that allowing 30 days for a completeness review and 45 days to determine whether the proposed work qualifies for NWP authorization makes the NWP process similar to the standard permit process, in terms of processing times. Two commenters remarked that the 30-day completeness review period should be included in the 45-day PCN review period. Two commenters said that the PCN should be considered complete if the Corps does not request additional information prior to the end of the 30 day completeness review period, so that the Corps cannot defer processing the PCN indefinitely. One commenter suggested that the Corps notify prospective permittees, through telephone calls or postcards, if their PCNs are complete. This commenter said that such a process would relieve some burdens associated with the proposed revisions to the notification process. Another commenter recommended modifying General Condition 13 to impose a time limit for the Corps to notify prospective permittees that all of the requested information has been received.

The 30 day completeness review period and the 45 day PCN review period are not independent of each other (i.e., they do not add up to a 75 day review period for NWP activities). If a prospective permittee submits a complete PCN to the Corps district office, the 45 day PCN review period begins on the date of receipt and the district engineer must decide whether to issue an NWP verification or exercise discretionary authority within 45 days. If the 30 day completeness review period has passed since the date of receipt of a PCN and the district engineer has not requested additional information to make the PCN complete, the applicant can assume the PCN is complete.

Other commenters recommended different time limits for PCN completeness reviews. One commenter said that the completeness review should be done on the date of receipt of the PCN and the applicant should be notified immediately that additional information is necessary to begin the PCN process. Other recommended time periods for completeness review included 7, 10, and 15 days. One commenter objected to the 30 day completeness review period, stating that it was longer than the completeness review period for standard permits (i.e., 15 days).

It is impractical for district engineers to conduct completeness reviews on the date of receipt. We believe the 30 day completeness review period is necessary because district engineers can make only one request for the information needed for a complete PCN.

Two commenters requested clarification whether the 45 day PCN review period starts on the day the Corps determines the PCN to be complete or the date the complete PCN is received in the district office. One commenter asked if the verification of wetland delineations would be done within the 30 day completeness review period. Two commenters supported allowing only one request for additional information. One commenter asserted that allowing only one request for additional information would cause Corps personnel to request large amounts of information, whether or not that information is necessary for the review of the PCN.

The 45 day PCN review period begins on the date of receipt of a complete PCN. If a complete PCN is submitted, the 45 day PCN review period starts on the date of receipt. If the PCN is incomplete and the prospective permittee submits the necessary information to make the PCN complete, the 45 day PCN review period starts on the date the additional information is received by the district engineer. The verification of delineations of special aquatic sites will be conducted during the 30 day completeness review period. A complete PCN is comprised of the information listed in paragraph (b) of General Condition 13. If the prospective permittee provides all of the relevant information listed in paragraph (b), then the PCN is complete (provided any delineations of special aquatic sites are accurate) and the 45 day PCN review period begins. District engineers cannot request information not listed in paragraph (b). If the district engineer believes that the proposed work may result in more than minimal adverse effects on the aquatic environment, based on the information required for the PCN, then he or she should exercise discretionary authority and require an individual permit to conduct a more thorough review of that activity.

Many commenters suggested that the Corps retain the 30 day PCN review period. One commenter said that 15 days would be adequate for the Corps to determine whether a complete PCN would qualify for NWP authorization and another commenter suggested a 40 day review period. Many commenters stated that the larger workload caused by the proposed new and modified NWPs is not sufficient justification for increasing the PCN review period to 45 days and requested that the Corps maintain the 30 day period.

We contend that the 45 day period is necessary to determine if a PCN is complete (within 30 days), conduct agency coordination if necessary, and review the PCN to determine if the proposed work is authorized by NWP. NWP 26 had a PCN review period of 45 days and we believe it is necessary to retain this time period for the new NWPs.

Several commenters stated that paragraph (b) of General Condition 13 should clearly state what is required for a complete PCN, so that applicants will know what they need to submit to the district engineer. These commenters also said that clearly stating what is required for a complete PCN would promote consistency. One commenter requested that the Corps clarify whether the phrase ''additional information'' refers only to the items necessary to make the PCN complete or to any other information that the district engineer believes is necessary for the review of the PCN. One commenter recommended adding a requirement for prospective permittees to supply all information identified in the NWP, special conditions, and regional conditions, as well as any information required by the district engineer. Two commenters objected to the amount of information required for PCNs.

Paragraph (b) of General Condition 13 lists all of the information necessary for a complete PCN. Corps districts can provide checklists to assist prospective permittees, especially if they have regional conditions that specify additional information that must be submitted with PCNs. The phrase ''additional information'' as used in the context of General Condition 13 refers only to the information that is necessary to make the PCN complete. We have limited the amount of information that must be submitted with a PCN to the minimum necessary to determine whether the proposed work will result in minimal adverse effects on the aquatic environment, individually and cumulatively.

Two commenters said that the statement in General Condition 13 indicating that the permittee can commence work if the district engineer does not respond to the PCN within 45 days is meaningless because of the suspension procedures at 33 CFR 330.5(d)(2), which allow the Corps to stop NWP activities in progress. These commenters said that the permittee cannot safely proceed with the activity until he or she receives authorization from the Corps.

Some prospective permittees may want assurance that the proposed work is authorized by NWP and will not start work until a written verification is received from the Corps. The procedures at 33 CFR 330.5(d)(2) provide a process where a permittee who begins work after the 45 day PCN period expires can make their case that they have expended resources and it would be inequitable for the Corps to modify their project.

One commenter suggested that the PCN review period should be waived in states using monthly coordination meetings to review and process permit applications. One commenter suggested adding a fourth item in paragraph (a), which would state that the prospective permittee shall not begin the activity ''If the District Engineer has notified the prospective permittee in writing that the notification is still incomplete.''

Paragraph (a) of General Condition 13 does not prohibit district engineers from responding to PCNs in a more timely manner provided all other requirements are completed. Paragraph (a) clearly states that district engineers will notify prospective permittees if their PCNs are still incomplete, and since the 45 day clock does not start until the PCN is complete, the prospective permittee may not start work.

One commenter stated that all PCNs should include delineations of special aquatic sites. Another commenter recommended adding NWPs 3 and 31 to paragraph (b)(4). One commenter said that delineations of riffle and pool complexes should not be required for PCNs because such a requirement imposes burdens on applicants, especially on large projects such as highways. A commenter suggested that the phrase ''submerged aquatic vegetation'' used in paragraph (b)(4) should refer only to vascular plants.

We do not agree that delineations of special aquatic sites should be submitted with all NWP PCNs. Since NWPs 3 and 31 authorize maintenance activities, it is not necessary to submit delineations of special aquatic sites with PCNs for these activities. Maps indicating stream segments containing riffle and pool complexes and their location can be used as delineations of these special aquatic sites. It is not necessary to map each riffle and pool complex within a stream. The phrase ''submerged aquatic vegetation'' refers only to vascular plants, not algae.

One commenter suggested that the Corps revise paragraph (b) of General Condition 13 to require documentation of baseline conditions for NWP 3 activities. This commenter also recommended that PCNs for NWP 3, 7, and 31 activities should include locations of disposal sites for dredged or excavated material. One commenter said that detailed mitigation and monitoring plans should be submitted with PCNs for activities authorized by NWPs 12, 14, 39, 40, 41, 42, 43, and 44. One commenter indicated that a statement discussing on-site avoidance and minimization should be required for all NWP activities that require PCNs. Another commenter asserted that a statement of avoidance and minimization should be required for NWPs 12, 14, 40, 41, and 42. One commenter said that the information required to be submitted with a PCN is inadequate to ensure compliance with ESA.

The text of paragraph (iii) of NWP 3 states that the permittee ''should'' provide evidence to justify the extent of the proposed restoration, but such evidence is not required. We do not agree that it is necessary to include location maps of disposal sites for dredging or excavation activities authorized by NWPs 3, 7, and 31, because the material removed from waters of the United States will not be deposited in waters of the United States, unless the district engineer issues a separate authorization to discharge that material into waters of the United States. Under that separate authorization process, the district engineer will assess the impacts to the disposal site. We maintain our position that compensatory mitigation plans, including monitoring plans, submitted with a PCN can be either conceptual or detailed. District engineers can require more detailed compensatory mitigation plans through special conditions of the NWP authorization where appropriate. We also do not agree that avoidance and minimization statements should be required for other NWPs. We maintain our position on this matter as it was discussed in the July 21, 1999, **Federal Register** notice. The information that must be submitted with a PCN is adequate for the Corps to make its initial determination concerning compliance with ESA.

Two commenters noted that the Corps did not add a provision to paragraph (b) of General Condition 13 that requires prospective permittees to submit a list of names of Federally-listed endangered or threatened species and the names or locations of historic properties that may be affected by the proposed work. The Corps stated in the July 21, 1999, **Federal Register** notice (64 FR 39340) that it would add these provisions to General Condition 13.

We have added these requirements to paragraph (b) of General Condition 13 as subparagraphs (17) and (18), respectively. In addition, we have modified subparagraph (b)(9) to comply

with the recent modification of NWP 29, which reduced the acreage limit to ¼ acre (see 64 FR 47175). We have also added subparagraph (b)(19), which describes the documentation that must be submitted with the PCNs for certain NWP activities within 100-year floodplains.

In paragraph (d) of the proposed modification of General Condition 13, one commenter objected to the use of the term ''net'' in the context of determining whether the adverse effects to the aquatic environment are minimal, after considering compensatory mitigation that offsets impacts authorized by NWPs. This commenter says that the wording of the second sentence of paragraph (d) is contrary to the Corps policy of determining that impacts authorized by NWPs are minimal without considering mitigation. One commenter asked if the term ''mitigation'' in paragraph (d) refers to compensatory mitigation. Another commenter requested a definition of the term ''adverse'' as it is used in the context of paragraph (d). One commenter requested that the Corps clarify whether the word ''work'' in paragraph (d) refers only to mitigation work or the permitted activity.

The language of paragraph (d) complies with Corps regulations for the NWP program, specifically 33 CFR 330.1(e)(3), which provides for the use of compensatory mitigation to offset losses of waters of the United States authorized by NWPs and ensure that the adverse effects on the aquatic environment are minimal. The word ''mitigation'' in the second sentence of paragraph (d) refers to the mitigation process. We do not agree that it is necessary to provide a definition of the term ''adverse'' since the commonly used definition is applicable. The word ''work'' refers to the proposed activity, but the compensatory mitigation is also considered when determining whether the adverse effects on the aquatic environment are minimal.

Two commenters supported the 1 acre threshold for agency coordination. One commenter suggested a ⅓ acre threshold. A number of commenters said that agency coordination should be required for all NWP activities that require PCNs. One commenter recommended agency coordination for activities that result in the loss of greater than 250 linear feet of stream bed. One commenter said that PCNs should be coordinated with the U.S. FWS for any NWP activity that could affect Federally-listed endangered or threatened species or their habitats. Another commenter indicated that agency coordination of PCNs should be conducted for any NWP activities in streams or aquatic resources of natural importance.

We are reducing the 1 acre threshold for agency coordination to ½ acre because most of the new NWPs have maximum limits of ½ acre. There will be coordination of some PCNs because there are NWPs based on other government programs, such as NWPs 17 and 38, that can authorize activities that result in the loss of greater than ½ acre of waters of the United States. If those NWPs require submission of a PCN to the district engineer and the proposed work will result in the loss of greater than ½ acre of waters of the United States, then the Corps will conduct agency coordination. Activities that may affect Federally-listed endangered or threatened species or their critical habitat will be coordinated with the U.S. FWS or NMFS, as appropriate. District engineers can conduct agency coordination in other circumstances at their discretion.

One commenter asked for clarification whether a PCN is transmitted to agencies upon receipt of the PCN or whether the PCN must be determined to be complete before it is sent to the agencies. Two commenters said that, for activities requiring agency coordination, the applicant should mail copies of the PCN to the review agencies to expedite the PCN process. One commenter recommended adding the Federal Emergency Management Agency (FEMA) to the list of agencies for coordination. Another commenter said that the Corps should provide written responses to agency comments received in response to PCNs. One commenter recommended inserting the word ''aquatic'' between the words ''adverse environmental'' in paragraph (e).

We do not start agency coordination until we determine that the PCN is complete. It would not be advantageous for a prospective permittee to submit a PCN directly to review agencies because the PCN may not be complete. District engineers can, at their discretion, include FEMA with the other review agencies. We do not agree that district engineers should provide written responses to agency comments, except where Essential Fish Habitat (EFH) conservation recommendations are received from NMFS in response to a PCN. There is a statutory requirement in the Magnuson-Stevens Fishery Conservation and Management Act for Federal action agencies to provide written responses to EFH conservation recommendations. We have modified paragraph (e) to address this requirement. We agree that we should include the word ''aquatic'' in the first sentence of paragraph (e).

Two commenters opposed the proposed changes to the agency coordination period. Three commenters said that 15 days is enough time for agency coordination. Other commenters suggested 5, 10, or 30 days for agency coordination. One commenter recommended 45 days for agency coordination, with the ability for agencies to receive an extension of time. One commenter requested clarification whether the 25 day agency review period is added to the 45 day PCN review period or whether the agency coordination process occurs during the 45 day PCN review period. One commenter said that the 25 day agency coordination period conflicts with ESA regulations, which provide 30 days to respond to a request for a list of species that may occur in the project area.

We will maintain the 10 day period for agencies to request an additional 15 days to provide substantive, site-specific comments on PCNs. Twenty-five days is sufficient for agencies to comment on PCNs. The agency coordination process occurs during the 45 day PCN review period. During the agency coordination period, the Corps is not requesting a list of Federally-listed endangered or threatened species that may be in the project area. Therefore, the agency coordination period does not violate ESA regulations.

Several commenters objected to the text in paragraph (f) that requires wetland delineations to be performed in accordance with the current method required by the Corps. These commenters assert that this language allows Corps personnel to use methods and criteria that are not in the 1987 *Corps of Engineers Wetlands Delineation Manual* and expand the Corps jurisdiction. These commenters said that the text of this paragraph should be revised to specifically reference the 1987 *Corps of Engineers Wetlands Delineation Manual.* Another commenter recommended that paragraph (f) include a statement that the permittee is responsible for the accuracy of the delineation of special aquatic sites.

We do not agree with these commenters. The only currently acceptable method that the Corps uses for delineating wetlands is the 1987 *Corps of Engineers Wetlands Delineation Manual* and associated guidance. We will not change the text of paragraph (f) because the required delineation manual may change in the future.

Several commenters recommended combining paragraph (g) of General

Condition 13 with General Condition 19 so that the mitigation requirements of the NWPs would be in one general condition. One commenter suggested that deed restrictions and protective covenants should be required as part of a compensatory mitigation proposal submitted with a PCN. One commenter recommended that the Corps reinstate the following language into subparagraph (ii) of paragraph (g): ''* * *should consider mitigation banking and other forms of mitigation including contributions to wetland trust funds, in lieu fees to non-profit land restoration and stewardship organizations, State or county natural resource management agencies, where such fees contribute to the restoration, creation, replacement, enhancement, or preservation of wetlands.''

We have moved paragraph (g) of General Condition 13 to General Condition 19. Prospective permittees can submit either conceptual or detailed compensatory mitigation proposals with their PCNs, but they are not required to submit deed restrictions or protective covenants at that time. As special conditions to a NWP verification, the district engineer may require deed restrictions or protective covenants for compensatory mitigation projects. We do not agree that it is necessary to put the referenced text back into the general condition because General Condition 19 allows district engineers the flexibility to consider all appropriate forms of compensatory mitigation, including mitigation banks and other consolidated approaches to compensatory mitigation.

One commenter objected to the statement in paragraph (g) of the proposed modification of General Condition 13 that identifies mitigation banks, in lieu fee programs, and other types of consolidated mitigation as preferred methods. This commenter said that if compensatory mitigation is necessary, the method should be at the discretion of the applicant and consider economic and environmental factors. This commenter also stated that the Corps should only determine if the compensatory mitigation method chosen by the applicant is appropriate.

Our preference for consolidated compensatory mitigation methods such as mitigation banks does not prohibit the use of other methods to provide compensatory mitigation, if the district engineer determines that the other methods are appropriate and adequately offset losses of aquatic resource functions and values. General Condition 19 clearly states that mitigation must be practicable, and the district engineer will consider costs and environmental factors when determining if the prospective permittee's compensatory mitigation proposal is acceptable.

Two commenters stated that the Corps should post PCNs on the Internet. Another commenter concurred with the Corps position against posting PCNs on the Internet, stating that such a process would result in delays to the regulated public and provide no additional value to the review of PCNs.

As discussed in the July 21, 1999, **Federal Register** notice, we maintain our position that posting of PCNs on Internet home pages would provide no added value to our review of these PCNs.

This general condition is adopted with the modifications discussed above.

15. Use of Multiple Nationwide Permits: In the July 21, 1999, **Federal Register** notice, we proposed to modify this general condition to ensure that the use of more than one NWP to authorize a single and complete project will result in minimal adverse effects on the aquatic environment.

One commenter supported the proposed modification of General Condition 15. Many commenters objected to the proposed modification of this general condition, stating that it would prohibit the authorization of activities with minimal adverse effects. One commenter said that the proposed modification is contrary to 33 CFR 330.6(c) and must be addressed through rulemaking. A number of commenters indicated that the use of more than one NWP to authorize a single and complete project should be unrestricted because of the low acreage limits of the proposed new and modified NWPs. Several commenters objected to permittees using more than one NWP to authorize a single and complete project. One commenter said that the proposed modification of this general condition will cause more piecemealing of activities and discourage watershed-based planning and compensatory mitigation.

The modification of General Condition 15 is necessary to ensure that the use of more than one NWP to authorize a single and complete project does not result in more than minimal adverse effects on the aquatic environment, individually and cumulatively. The proposed modification is not contrary to 33 CFR 330.6(c) because that provision in the NWP regulations simply states that two or more different NWPs can be combined to authorize a single and complete project. With the modification of General Condition 15, we are not prohibiting the use of more than one NWP to authorize a single and complete project. Instead, we are simply imposing an acreage limit based on the maximum specified acreage limit of those NWPs used to authorize a single and complete project. We do not agree that the modification of General Condition 15 will encourage piecemealing of activities, since the definition of the term ''single and complete project'' is clearly defined at 33 CFR 330.2(i) and this definition has not changed. The modification of this general condition is adopted as proposed.

16. Water supply intakes: In the July 21, 1999, **Federal Register** notice, we did not propose any changes to this general condition. One commenter objected to this general condition, stating that it is too vague, excessive, and difficult to manage. This commenter recommend that the Corps require submission of a PCN when a proposed activity is within 1 mile upstream of a public water supply intake.

District engineers will determine whether an activity is subject to this general condition. Imposing a notification requirement based on a distance from an intake structure is not appropriate for a national condition, but division engineers can regionally condition the NWPs to establish specific distances from public water supply intakes. This general condition is adopted without change.

17. Shellfish Beds: In the July 21, 1999, **Federal Register** notice, we proposed to change the title of this general condition from ''Shellfish Production'' to ''Shellfish Beds.'' We also proposed to change the phrase ''concentrated shellfish production'' to ''concentrated shellfish populations'' because the word ''production'' implies that the general condition applies only to areas actively managed for shellfish production.

Two commenters recommended that the Corps change this general condition from a prohibition against activities in areas of concentrated shellfish populations to a notification requirement when any proposed NWP activity may cover concentrated shellfish populations. One commenter objected to changing the title of this general condition from ''Shellfish Production'' to ''Shellfish Beds.'' This commenter also indicated that the restrictions imposed by this general condition are too broad.

With the exception of NWP 4, we do not agree that the NWPs should authorize activities in concentrated shellfish beds. Changing the terms of this general condition from ''shellfish production'' to ''shellfish beds'' is necessary to ensure that activities authorized by NWPs result in minimal

adverse effects on the aquatic environment, especially in areas of concentrated shellfish populations that may be harvested for human consumption. The modification of this general condition is adopted as proposed.

18. Suitable Material: In the July 21, 1999, **Federal Register** notice, we did not propose any changes to this general condition, but one commenter requested further definitions of suitable material and debris that can be used.

We do not agree that it is necessary to further define what constitutes ''suitable material'' for the purposes of this general condition. It is impractical to provide a comprehensive list of unsuitable materials. If there are questions concerning the suitability of a particular material, the permittee should contact the appropriate Corps district office and ask if that material is considered suitable for the purposes of General Condition 18. This general condition is adopted without change.

19. Mitigation: In the July 21, 1999, **Federal Register** notice, we proposed several changes to this general condition. Several commenters recommended combining the mitigation information in paragraph (g) of General Condition 13 with this general condition. One commenter stated that this general condition is contrary to the 1990 mitigation MOA. Numerous commenters said that General Condition 19 should specify that mitigation is required, to the maximum extent practicable, in the same watershed as the impact site.

We have combined the provisions of paragraph (g) of General Condition 13 with the provisions of General Condition 19, so that the mitigation requirements for the NWPs are in General Condition 19. The 1990 mitigation MOA applies only to standard individual permits, not general permits such as the NWPs. Although we encourage permittees to locate compensatory mitigation in the same watershed as the site of the authorized work, there are occasions where it may be necessary or more beneficial to the aquatic environment to implement compensatory mitigation outside of the watershed. For example, restoring wetlands in a degraded watershed to compensate for losses of wetlands in a watershed with less impacts may be better for the overall aquatic environment.

One commenter suggested that General Condition 19 should contain a provision that allows district engineers to determine that compensatory mitigation is unnecessary if the adverse effects on the aquatic environment are minimal without compensatory mitigation. Several commenters objected to the phrase in the second sentence of the proposed modification of General Condition 19 which states that compensatory mitigation is required ''__* * * at least to the extent that adverse environmental effects to the aquatic environment are minimal.'' These commenters contend that this language allows the Corps to require mitigation in excess of the amount necessary to offset the authorized impacts.

In accordance with the NWP regulations, district engineers can determine that compensatory mitigation is not necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment. District engineers will require only the amount of compensatory mitigation that is needed to ensure that the net adverse effects on the aquatic environment are minimal, individually and cumulatively.

One commenter supported the inclusion of enhancement and preservation in the definition of compensatory mitigation. Another commenter said that the definition of mitigation should be expanded from restoration, creation, enhancement, preservation, and vegetated buffers to include avoiding, minimizing, rectifying, reducing, or compensating for losses of aquatic resources to make it consistent with paragraph (g) of General Condition 13, which recognizes this broader definition.

Since we have moved the provisions of paragraph (g) of General Condition 13 to General Condition 19, this general condition recognizes these types of mitigation. Rectifying impacts to the aquatic environment is similar to the enhancement and restoration of aquatic resources. Reducing impacts to the aquatic environment is similar to minimization.

A number of commenters objected to the removal of the phrase ''unless the District Engineer approves a compensation plan that the District Engineer determines is more beneficial to the environment than on-site minimization and avoidance measures'' which was in December 13, 1996, version of ''Section 404 Only'' Condition 4, from which General Condition 19 was derived. These commenters stated that the removal of this language conflicts with some recent statements by the Corps, including preferences for mitigation banks and in lieu fee programs. One commenter indicated that permittees should have options for providing compensatory mitigation, including the ability to utilize off-site compensatory mitigation (e.g., mitigation banks and in lieu fee programs) and out-of-kind compensatory mitigation (e.g., vegetated buffers next to open waters).

The modification of General Condition 19 does not conflict with our preference for using consolidated compensatory mitigation methods to offset losses of waters of the United States authorized by NWPs. General Condition 19 simply states that the district engineer will require, when necessary, the restoration, creation, enhancement, or preservation of aquatic resources to ensure that the adverse effects on the aquatic environment are minimal, individually and cumulatively. That compensatory mitigation can be provided by individual compensatory mitigation projects or consolidated mitigation methods, such as mitigation banks. District engineers have flexibility to determine the appropriate options for compensatory mitigation on a case-by-case basis. For activities authorized by NWPs, the selected compensatory mitigation method should be based on what is best for the aquatic environment and what is practicable for the permittee.

One commenter recommended modifying the vegetated buffer requirements in General Condition 19 to allow district engineers to waive these requirements if it is impractical for the permittee to establish and maintain vegetated buffers. Another commenter suggested that General Condition 19 should be modified to place more emphasis on on-site avoidance and minimization so that large scale mitigation such as vegetated buffers would be required only in exceptional circumstances. Two commenters said that the text of General Condition 19 should be rewritten to acknowledge that NWPs authorize activities that have minimal adverse effects on the aquatic environment and that most mitigation for NWP activities would consist of avoidance and small restoration projects, not the large scale mitigation that would result from establishing 50 to 125 foot wide vegetated buffers. One commenter stated that General Condition 19 does not contain specific requirements for maintaining and protecting vegetated buffers and asked how the maintenance of vegetated buffers will be guaranteed. One commenter objected to requiring vegetated buffers to be comprised of native species, because it would necessitate the removal of undesirable species in existing riparian buffers.

We have added the phrase ''to the maximum extent practicable'' to the

second sentence in paragraph (c) to clarify that vegetated buffers next to open waters can be required as compensatory mitigation only if such a requirement is practicable for the project proponent. District engineers will determine on a case-by-case basis whether vegetated buffers are necessary and the appropriate width of those vegetated buffers. Recommended widths of vegetated buffers are discussed in a previous section of this **Federal Register** notice. We have also added a provision to General Condition 19 that limits the proportion of compensatory mitigation that can be provided by vegetated buffers next to open waters. If compensatory mitigation for wetland impacts is necessary to ensure that an NWP activity results in minimal adverse effects on the aquatic environment and there are open waters on the project site, any vegetated buffer will comprise no more than 33% of the remaining compensatory mitigation acreage after the permanently filled wetlands have been replaced on a one-to-one acreage basis. Of course, many vegetated buffers will be wetlands and can be included as compensatory mitigation for wetland impacts.

Vegetated buffers are an alternate method of compensatory mitigation and should be protected in the same manner as wetland compensatory mitigation sites (i.e., through deed restrictions, conservation easements, or other appropriate legal means). The language of General Condition 19 does not require the removal of non-native plant species from the area where the vegetated buffer will be established and maintained. If the permittee is planting the vegetated buffer, he or she should use native plant species. Vegetated buffer zones that are already established with mature trees or shrubs can be maintained without removing those plants to replace them with native species. This general condition is adopted with the modifications discussed above.

20. Spawning Areas: In the July 21, 1999, **Federal Register** notice, we proposed to modify this general condition by adding the word ''important'' before the phrase ''spawning areas.'' The proposed modification would limit this general condition to spawning areas used by species harvested commercially for human consumption.

One commenter objected using the word ''important'' in this general condition, stating that it ignores the fact that commercially harvested fish species often rely on non-commercial species for survival . Two commenters said that this general condition should apply to all spawning areas. One commenter recommended expanding the scope of General Condition 20 to spawning areas of importance to recreational fisheries. One commenter suggested that the phrase ''important spawning areas'' should be replaced with ''spawning areas that support Federally-listed or special status fish.'' A commenter said that spawning areas that are important for state-listed endangered or threatened species or ecologically important fish species can be addressed through General Condition 25, Designated Critical Resource Waters. One commenter requested that the Corps provide a definition of the term ''substantial'' as it is used in the context of this general condition because many species of fish can tolerate high turbidity levels for short periods of time.

We maintain our position that the terms of this general condition should be limited to spawning areas used by species that are harvested commercially for human consumption. Division engineers can impose regional general conditions to restrict or prohibit activities in spawning areas used by other species. We cannot provide a definition of the word ''substantial'' as it is used in the context of this general condition because it is more appropriate to make this determination on a case-by-case basis, depending on the characteristics of the project site and the species that may be affected. This general condition is adopted as proposed.

21. Management of Water Flows: In the July 21, 1999, **Federal Register** notice, we proposed to modify this general condition to require permittees to maintain, to the maximum extent practicable, preconstruction surface water flow patterns.

Three commenters supported the proposed modification of General Condition 21. Several commenters objected to the proposed modification. One commenter suggested that the text of the proposed modification should be withdrawn and replaced with the original language of ''Section 404 Only'' Condition 6. A number of commenters stated that the Corps does not have the statutory authority to impose the requirements of this general condition. Two commenters indicated that the proposed modification of General Condition 21 is contrary to 33 CFR 320.4(m). One commenter said that best management practices should be required instead of this general condition. Numerous commenters stated that the requirements of General Condition 21 duplicate existing state or local programs. One commenter expressed concern that this general condition will impose requirements that are contrary to local standards or watershed plans. One commenter said that the requirements of this general condition will make the NWP program useless because all dredge and fill activities affect water flow.

We have statutory authority, through section 404 of the Clean Water Act, to impose General Condition 21 because this general condition is necessary to ensure that activities authorized by NWPs result in minimal adverse effects on the aquatic environment. Flooding and erosion that results from changes in surface water flows can have more than minimal adverse effects on the aquatic environment. The requirements of this general condition are not contrary to 33 CFR 320.4(m) because that section of the Corps regulations, which addresses the allocation of water supplies, is unrelated to the intent of General Condition 21.

District engineers can refer to best management practices to assist permittees in complying with this general condition, but we do not agree that best management practices are more efficient methods of achieving the objectives of General Condition 21. Although the requirements of this general condition may duplicate existing state or local programs, it is important to note that not all state and local governments address the management of water flows. Therefore, we believe that it is necessary to impose, on a nationwide basis, the requirements of General Condition 21 on activities authorized by NWPs. If the state or local government adequately addresses the management of surface water flows, the district engineer will defer to those agencies. However, if the state or local government does not adequately address the management of water flows, district engineers will determine if the proposed work complies with General Condition 21 and may impose special conditions on the NWP to ensure that the authorized work results in minimal adverse effects on surface water flows. If the activity is part of a larger system designed to manage water flows, then activity-specific management of water flows is not required. It is unlikely that this general condition will result in requirements that are contrary to watershed plans, because the intent of General Condition 21 is to ensure that activities authorized by NWPs result only in minimal adverse effects on the aquatic environment.

Although most discharges of dredged or fill material into waters of the United States authorized by NWPs alter surface water flow patterns, these changes are

usually minimal or could be mitigated to the minimal adverse effect level and would comply with General Condition 21. If more than minimal changes to surface water flows will occur as a result of the proposed work, the activity should be reviewed through the individual permit process or the activity should be modified with mitigation to comply with General Condition 21.

Two commenters objected to the proposed modification, stating it is too subjective. These commenters said that a lack of specific criteria will cause inconsistent and arbitrary implementation. These commenters requested specific criteria that will allow consistent determination of compliance. One commenter stated that the general condition should specify a storm event magnitude that will be used to determine compliance, because requiring no change in water flows for a 2-year storm event is different that requiring no change in water flows for a 100-year storm event. A commenter requested clarification whether the general condition addresses stream flow, overland flow, and/or stormwater flow. One commenter objected to the proposed modification of this general condition because it requires only qualitative analysis. Two commenters opposed the proposed modification of General Condition 21 because the Corps has not explained how compliance will be determined, specifically how pre-construction and post-construction water flows will be determined. One commenter recommended that the Corps adopt the guidelines at 23 CFR Part 650 (i.e., the Federal Highway Administration's regulations concerning bridges, structures, and hydraulics) to address floodplain encroachments and provide consistency for permit applicants.

We do not agree that specific criteria should be provided nationally, because of the large variability in hydrologic regimes and site conditions across the country. District engineers are better suited to establish local qualitative criteria to determine compliance with this general condition. As discussed in the July 21, 1999, **Federal Register** notice, this general condition applies to general surface water flow patterns over the course of a year, not to any particular storm event. The types of water flows subject to this general condition include both stream flows and overland flow. For example, this general condition prohibits the use of NWPs to authorize activities that will redirect substantial amounts of surface water to adjoining property owners and more than minimally increase the magnitude of flooding on their property.

To determine compliance with this general condition, district engineers will rely on their judgement and knowledge of local water flow patterns. District engineers will not require detailed hydrologic analyses or engineering studies.

Two commenters stated that requiring permittees to maintain, to the maximum extent practicable, surface water flows from the site is an impossible standard to meet, since such a requirement allows no change from pre-construction water flow conditions. Two commenters said that the phrase ''to the maximum extent practicable'' is an arbitrary threshold and will result in disputes between the Corps and project proponents with no mechanism for resolution.

The phrase ''to the maximum extent practicable'' provides flexibility for permittees to comply with the requirements of General Condition 21. This general condition does not establish a ''no effect'' requirement for compliance. It does not prohibit changes to surface water flows. General Condition 21 merely requires that the activity cause only minimal changes to surface water flows and maintain those flows so that they are similar, not necessarily identical, to preconstruction flow conditions. If changes to surface water flows will be more than minimal, the district engineer will either mitigate those impacts, or if that is not practicable, assert discretionary authority and require an individual permit.

Several commenters said that the analysis required to determine compliance with General Condition 21 is costly and burdensome on project proponents and is inappropriate for NWP activities. One commenter recommended that the text of this general condition include a statement requiring district engineers to defer to state and local agencies that have adequate requirements to manage water flows. A commenter suggested that General Condition 21 should be modified to provide greater flexibility for flood control and stormwater management activities, because this would allow permittees to demonstrate that changes in water flows comply with state or local flood control standards or benefit local hydrology or flow regimes. Another commenter recommended that activities authorized by NWPs should also be designed to allow the movement of aquatic organisms or require mitigation to maintain those movements.

Since district engineers will not require detailed hydrologic or engineering analyses, and must utilize qualitative analyses to determine whether or not a particular activity complies with this general condition, there will not be additional economic burdens on prospective permittees. Although district engineers should defer to state and local agencies if those agencies already impose adequate requirements for maintaining surface water flows, we do not agree that it is necessary to make this statement in the text of General Condition 21. We believe that the text of General Condition 21 provides adequate flexibility for flood control and stormwater management activities because it requires maintenance of surface water flows to the maximum extent practicable. In addition, this general condition does not prohibit the construction of facilities that impound water, such as retention or detention ponds, if the primary purpose of the project is to impound water. General Condition 4, Aquatic Life Movements, already addresses the issues raised by the last comment in the previous paragraph.

In the text of General Condition 21, we have changed the word ''project'' to ''activity'' to be consistent with the other general conditions, which refer to activities. This general condition is adopted with the modification discussed above.

23. Waterfowl Breeding Areas: In the July 21, 1999, **Federal Register** notice, we did not propose any changes to this general condition. One commenter recommended expanding this general condition to include all wetland-dependent migratory bird species.

We do not agree with this comment, because the intent of this general condition is to ensure that the NWPs do not authorize activities that result in more than minimal adverse effects to waterfowl, not all migratory bird species that may utilize wetlands. This general condition is retained without change.

24. Removal of Temporary Fills: In the July 21, 1999, **Federal Register** notice, we did not propose any changes to this general condition. One commenter requested clarification as to what constitutes a ''temporary'' fill by establishing time limits. Another commenter said that certain temporary fills, such as gravel, may be used by project proponents and left in stream beds to enhance habitat for spawning fish species. This commenter suggested that the Corps modify this general condition to allow temporary fills to remain in waters of the United States if those fills are for a permit requirement of any other regulatory agency.

District engineers will determine, on a case-by-case basis, what constitutes a temporary fill. Fills that are left in

waters of the United States as a condition of permit issued by another agency must also be authorized by Section 404 of the Clean Water Act (and Section 10 of the Rivers and Harbors Act if the fill is in navigable waters). These fills may be authorized by NWPs, regional general permits, or individual permits. This general condition is retained without change.

General Comments on Proposed General Conditions 25, 26, and 27: In the July 21, 1999, **Federal Register** notice, we proposed three new NWP general conditions that would limit the use of NWPs in designated critical resource waters, impaired waters, and waters of the United States within 100-year floodplains.

A number of commenters supported the three proposed NWP general conditions. Many commenters objected to the proposed general conditions, stating that there is no need for these restrictions. Several commenters opposed these three general conditions, because they duplicate other programs. Several commenters stated that the proposed general conditions will not provide any environmental benefits. Several commenters said that concerns for critical resource waters, impaired waters, and 100-year floodplains can be adequately addressed through the PCN process and the ability of district engineers to exercise discretionary authority on those activities that will result in more than minimal adverse effects on the aquatic environment. Other commenters stated that regional conditions would adequately address these issues.

After reviewing the comments addressing the three proposed NWP general conditions, we have decided to adopt proposed General Condition 25, Designated Critical Resource Waters, and proposed General Condition 27, Fills Within the 100-year Floodplain. We have decided to withdraw proposed General Condition 26, Impaired Waters. Proposed General Condition 27 has been substantially modified, as discussed below. This general condition has been designated as General Condition 26, Fills Within 100-year Floodplains. The new general conditions, in conjunction with the 1/2 acre limit for most of the new NWPs, will provide substantial environmental benefits. We do not agree that regional conditions are a better mechanism to address these issues, since the new general conditions address issues of national concern.

Several commenters said that the proposed new NWP general conditions will substantially reduce the regulated public's ability to efficiently obtain authorization for activities that have minimal adverse effects on the aquatic environment. Two of these commenters remarked that it will be more difficult to obtain authorization for maintenance activities. Several commenters stated that the proposed general conditions replace the ''minimal adverse effect'' criterion of the NWPs with a ''no effect'' criterion. Numerous commenters asserted that the assumption that activities in designated critical resource waters, impaired waters, and 100-year floodplains will result in more than minimal adverse effects on the aquatic environment is incorrect. These commenters said that many activities authorized by NWPs in these areas may actually improve water quality or provide essential public health and safety functions.

The two new NWP general conditions will not make it more difficult to obtain authorization for maintenance activities. Many maintenance activities are eligible for the Section 404(f) exemptions. NWP 3 activities in designated critical resource waters require notification to the district engineer but may be authorized. General Condition 26 does not restrict NWP 3 or NWP 31 activities in 100-year floodplains. The intent of the new general conditions is to ensure that the NWPs comply with the statutory requirements of Section 404(e) of the Clean Water Act. Although these conditions will limit the use of NWPs in certain waters, activities in these waters may be authorized by other forms of DA permits, such as regional general permits or standard permits.

One commenter stated that the proposed general conditions are contrary to the Corps goal of focusing its limited resources on those activities with the potential for greater environmental impacts. Two commenters said that without additional resources to implement and enforce the three proposed general conditions, there will be a decrease in environmental protection. One of these commenters said that these general conditions are too confusing and difficult to enforce. Two commenters objected to these general conditions because they substantially reduce the geographic area in which the NWPs can be used. One commenter stated that the proposed general conditions improperly change the focus of the NWPs from the type of activity to the location of the activity. Another commenter said that the proposed general conditions are confusing because of specific inconsistencies, such as the imposition of an acreage limit in proposed General Condition 26 without similar acreage limits in proposed General Conditions 25 and 27 or the different applicability of these general conditions for specific NWPs. For example, NWP 39 cannot be used in the 100-year floodplain but it can be used to authorize discharges of fill material into impaired waters and adjacent wetlands.

We agree that the proposed general conditions may have resulted in a decrease in environmental protection. However, the changes we have made will ensure that the conditions will substantially increase protection of the aquatic environment. General Condition 25 restricts the use of NWPs in high value waters, which is analogous to the increased emphasis on regional conditioning we placed on the proposed new and modified NWPs. General Condition 26 will minimize adverse effects to the flood-holding capacity of 100-year floodplains, as well as enhance protection of free-flowing streams in the regulated floodway. Although the two new NWP general conditions reduce the geographic scope of the NWPs, these conditions are necessary to ensure that the NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment. The location of a waterbody or wetland has a substantial influence on the functions and values it provides. For example, a wetland within a 100-year floodplain may provide fish spawning habitat that is not provided by an isolated wetland. The differences in the requirements between the two general conditions are necessary because each of these conditions addresses different issues. Therefore, each of the new NWP general conditions requires different restrictions or limitations to ensure that the NWPs authorize activities with minimal adverse effects on the aquatic environment.

25. Designated Critical Resource Waters: In the July 21, 1999, **Federal Register** notice, we proposed a new general condition that would limit the use of certain NWPs in designated critical resource waters.

Many commenters expressed their support for the proposed general condition. A number of commenters opposed this general condition. One commenter said that General Condition 25 will severely restrict the NWP program and make it unusable. Some commenters stated that NWPs should not authorize activities in designated critical resource waters.

Numerous commenters said the proposed general condition is based on an invalid assumption that all discharges of dredged or fill material into designated critical resource waters will always jeopardize any essential functions that make these waters high value. These commenters stated that

this assumption is invalid because the NWPs authorize activities with minimal adverse effects on the aquatic environment. One commenter said that this general condition imposes a ''no effect'' standard instead of a ''minimal effect'' standard. Many commenters suggested that protection of designated critical resource waters is more effectively provided through regional conditions imposed by division engineers and the PCN process. The PCN process allows district engineers to add special conditions to NWP authorizations or exercise discretionary authority to require individual permits for activities that result in more than minimal adverse effects on the aquatic environment.

General Condition 25 does not prohibit the use of all NWPs in designated critical resource waters or adjacent wetlands. Only those NWP activities that are likely to result in more than minimal adverse effects on designated critical resource waters are restricted by General Condition 25. Although regional conditions and the PCN process may have fully protected designated critical resource waters, we believe that for the waters listed nationwide restrictions are appropriate. We believe that a national condition is necessary for certain categories of waters.

One commenter said that NOAA-designated marine sanctuaries should be subject to the same restrictions that General Condition 7 imposes on activities in Wild and Scenic Rivers. This commenter stated that the use of NWPs should be allowed if those activities are approved by the agency managing those sanctuaries. This commenter also said that National Estuarine Research Reserves do not require extra protection through General Condition 25 because they are already protected by coastal states and NOAA.

We do not agree that NOAA-designated marine sanctuaries should be subject to the same restrictions as Wild and Scenic Rivers. We believe that the listed NWPs would likely result in more than minimal adverse effects to these important waters. We believe that restricting the use of certain NWPs in National Estuarine Research Reserves is necessary.

Many commenters stated that existing General Condition 7 provides adequate protection for Wild and Scenic Rivers, and recommended the removal of Wild and Scenic Rivers from the list of designated critical resource waters in General Condition 25. Several commenters opposed the inclusion of critical habitat for Federally-listed endangered or threatened species as designated critical resource waters, stating that General Condition 11 already provides sufficient protection for these areas. Numerous commenters objected to the provision in General Condition 25 that requires concurrence from the U.S. FWS or NMFS that the proposed work complies with General Condition 11. One of these commenters said that this provision is contrary to the Endangered Species Act (ESA), which requires consultation only for those activities that adversely affect Federally-listed endangered or threatened species or their critical habitat. Two commenters indicated that this provision inappropriately shifts the responsibility for determining effects on endangered or threatened species from the Corps to the U.S. FWS or NMFS. One commenter said that this provision is not strong enough.

General Condition 25 merely states that activities involving discharges of dredged or fill material into Wild and Scenic Rivers must comply with General Condition 7. This general condition does not impose any additional restrictions on NWP activities in Wild and Scenic Rivers. We believe that the provisions concerning designated critical habitat for Federally-listed endangered or threatened species in General Condition 25 are necessary to ensure compliance with ESA. Moreover, we believe that designated critical habitat deserves the highest level of protection, thus for the NWPs listed, we will seek the concurrence of the FWS to ensure protection.

One commenter recommended the removal of state natural heritage sites from the list of designated critical resource waters. Another commenter said that General Condition 25 will prohibit the use of many NWPs in certain counties, since some state natural heritage sites encompass entire counties. One commenter requested clarification as to what constitutes a ''state natural heritage site.''

We are maintaining state natural heritage sites in the list of designated critical resource waters because these areas typically contain high value waters. A state natural heritage site has been designated, through a state legislative or regulatory process, as an area that warrants additional protection due to its natural resource characteristics. Therefore, we believe that authorizing projects under NWPs would likely result in more than minimal adverse effects on the aquatic environment.

One commenter objected to including outstanding national resource waters in the list of designated critical resource waters. This commenter said that this general condition should be limited to waters that are defined by Federal standards, not state standards, because there is a need for consistency across state boundaries. Two commenters said that outstanding national resource waters already receive special protection from states through an existing program. These commenters cited EPA's regulations at 40 CFR 131.12(a)(3). Three commenters supported the requirement for the legislature or governor to designate waters with particular environmental or ecological significance. Three commenters said that other state or local officials should be able to designate waters with environmental or ecological significance that should be subject to this general condition.

We believe that outstanding national resource waters should be subject to the provisions of General Condition 25, because these waters are typically high value waters. We maintain our position that outstanding national resource waters must be officially designated by the state as having particular environmental or ecological significance. To be subject to General Condition 25, those outstanding national resource waters must be identified and approved by the district engineer after public notice and opportunity for comment. We do not agree that state or local officials should be able to designate additional waters that will be subject to General Condition 25, without the district engineer providing an opportunity for public notice and comment.

Three commenters supported allowing district engineers to include additional waters after public notice and opportunity for comment. Several commenters opposed this mechanism, because it would provide no additional protection since these waters are already protected by state and local governments. Two commenters indicated that waters identified by Federal and state agencies as designated critical resource waters should be subject to a public review process. Two commenters stated that the use of the word ''include'' in the first sentence of General Condition 25 implies that there are other waters that are considered to be designated critical resource waters and subject to this general condition. A commenter requested clarification as to what constitutes an official designation as having particular environmental or ecological significance. This commenter said that public notice at the district level should be adequate to make this designation.

We have modified General Condition 25 to explicitly state that district

engineers can designate additional critical resource waters after notice and opportunity for public comment. This process is similar to the NWP regional conditioning process whereby district engineers would identify high value waters that should be subject to NWP restrictions. Waters having particular environmental or ecological significance should be designated by the governor or legislature, and the district engineer can designate these waters as critical resource waters for the purposes of General Condition 25, after public notice and opportunity for comment. In contrast to the regional conditioning process, the district engineer would approve any additional critical resource waters for the purposes of General Condition 25.

One commenter asked why wetlands adjacent to designated critical resource waters are included in General Condition 25. Several commenters recommended that the Corps replace the word ''adjacent'' with ''contiguous'' to clarify the geographic scope of this general condition and make it easier to implement. One commenter stated that adjacent wetlands are not clearly defined for the purposes of this general condition. Another commenter remarked that waters adjacent to designated critical habitat are not subject to the same ESA requirements as designated critical habitat and should not be treated as such.

Wetlands adjacent to designated critical resource waters are included in General Condition 25 because these wetlands can have substantial influences on the quality of these waters. We believe that this is true for all critical resource waters, including designated critical habitat for endangered species. For the purposes of this general condition, the definition term ''adjacent'' is the same as the definition at 33 CFR 328.3(c).

Several commenters requested that the Corps define what constitutes an ''effect'' to a designated critical resource water. Two commenters indicated that it is difficult for the public to know which waters are subject to General Condition 25 because that information is not readily available and the list of applicable waters can change frequently. Several commenters suggested that the Corps produce maps of designated critical resource waters and subject those maps to a public comment process.

For the purpose of General Condition 25, the term ''directly affecting'' refers to activities involving discharges of dredged or fill material into waters of the United States. Prospective permittees should contact the appropriate Corps district to determine if any designated critical resource waters occur in the vicinity of the proposed work. Corps districts can produce maps of designated critical resource waters to aid in the implementation of this general condition, but such maps are not required.

Several commenters said that states can restrict the use of NWPs in certain waterbodies through the Section 401 water quality certification process and that state-designated waters should not be subject to General Condition 25. Another commenter stated that the Corps should not restrict discharges into designated critical resource waters if other Federal or state agencies have not imposed restrictions on those waters.

We believe that the provisions in General Condition 25 are necessary to ensure that the NWPs only authorize activities with minimal adverse effects on the aquatic environment, individually or cumulatively. Other Federal and state agencies may not have the regulatory authority to restrict or prohibit discharges of dredged or fill material into designated critical resource waters. Therefore, it is appropriate for the Corps to impose such restrictions, since such discharges are regulated by the Corps under Section 404 of the Clean Water Act.

One commenter recommended adding NWP 13 to the list of NWPs that are prohibited in this general condition. Another commenter suggested that NWP 8 should be added to the list of NWPs that cannot be used in designated critical resource waters. Many commenters objected to the inclusion of maintenance activities (*e.g.*, NWPs 3 and 31) in General Condition 25 because these activities have minimal adverse effects on the aquatic environment and delaying the authorization of these activities is unsafe and contrary to the public interest. Some commenters suggested removing NWPs 7 and 43 from the list of prohibited activities. Many commenters said that NWPs 12 and 14 should not be restricted in these waters. Some of these commenters stated that submission of a PCN to the district engineer is adequate to ensure that the work results in minimal adverse effects on the aquatic environment. Two commenters said that NWP 25 should not be subject to this general condition. A commenter stated that NWP 35 should be included in the list of NWPs that require notification. This commenter also indicated that it is unnecessary to require a PCN for activities authorized by NWPs 22, 27, 30, and 37.

We do not agree that NWPs 13 or 8 should be added to the list of NWPs in paragraph (a) of General Condition 25. NWP 3 activities can occur in designated critical resource waters, provided those activities result in minimal adverse effects on the aquatic environment. The maintenance of flood control facilities constructed in designated critical resource waters could result in more than minimal adverse effects on the aquatic environment, and should be reviewed through other DA permit processes. We continue to believe that NWPs 7, 12, 14, 35, and 43 should be subject to the restrictions in paragraph (a). We do not agree that the PCN process is a more effective mechanism to review activities in designated critical resource waters. We believe that the activities authorized by NWPs 22, 25, 27, 30, and 37, should be reviewed on a case-by-case basis if they are located in designated critical resource waters or adjacent wetlands.

Many commenters suggested additional waters that should be included in the list of designated critical resource waters. Numerous commenters recommended groundwater recharge areas and sources of drinking water as designated critical resource waters. Other suggested waters include: primary nursery areas and shellfish waters; streams that support cold water fisheries; areas used by migratory birds; waters of the United States in wilderness areas, national parks, and wildlife refuges; areas identified by state natural heritage programs as supporting high concentrations of rare species; vernal pools; stream segments and waterbodies proposed for listing under section 303(d) of the Clean Water Act; waters supporting salmonid fisheries; and wetlands that are rare and difficult to replace, such as peatlands, potholes, vernal marshes, playas, kettles, high altitude wetlands, and mature forested wetlands.

Concerns regarding these waters are more effectively addressed through other processes, such as regional conditioning of the NWPs or case-specific review of PCNs. Division engineers can regionally condition the NWPs to prohibit or limit their use in such high value waters. District engineers will exercise discretionary authority and require individual permits if activities proposed in designated critical resource waters will result in more than minimal adverse effects on the aquatic environment. Proposed General Condition 25 is adopted with the modifications discussed above.

26. Impaired Waters: In the July 21, 1999, **Federal Register** notice, we proposed a new general condition that

would limit the use of NWPs in waterbodies that are identified as impaired through the Clean Water Act Section 303(d) process. The sources of impairment considered for the proposed general condition were: nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, or the loss of wetlands. The proposed limitation would also apply to wetlands adjacent to the impaired waterbody.

Many commenters supported the proposed General Condition 26 and many commenters opposed this proposed general condition. Numerous commenters said that the NWPs should not authorize activities in impaired waterbodies. A large number of commenters supported the identification of impaired waters through the Clean Water Act Section 303(d) process. One commenter supported the exclusion of NWP 3 from the 1 acre limit imposed by General Condition 26. Two commenters stated that the limitations in this general condition should apply to all wetlands in the watershed or sub-basin, not only to those wetlands that are adjacent to the impaired waters.

Those commenters that expressed opposition to the proposed general condition stated that the limitations in General Condition 26 are unnecessary and would provide no benefits for the environment. Many commenters objected to the proposed general condition because they believe that activities in waters of the United States may have no effect on the actual cause of impairment. Numerous commenters objected to the presumption in proposed General Condition 26 that NWP activities would result in further impairment of waterbodies. Some commenters indicated that certain NWP activities improve water quality. For example, these commenters said that NWPs can authorize activities that stabilize eroding stream banks, improve fish passage, improve the quality of highway runoff, or decrease peak flows. Several commenters believe that the Corps lacks the legal authority to impose this general condition. One commenter said that General Condition 26 is unnecessary because the quality of waters is improving. Several commenters stated that the limitations of General Condition 26 place more value on impaired waters than unimpaired waters. Two commenters indicated that the requirements of this general condition make permittees responsible for mitigating impacts to water quality that they did not cause.

Many commenters recommended using the PCN process and discretionary authority to address impacts to impaired waters, instead of utilizing a prohibition. A number of commenters said that the NWPs should be used to authorize discharges of dredged or fill material into impaired waters and adjacent wetlands if the adverse effects on the aquatic environment are minimal. Two commenters stated that the criterion of ''no further impairment'' imposes a ''no adverse effect'' standard on the NWPs, not a ''minimal adverse effect'' standard. Several commenters said that the limitations imposed by proposed General Condition 26 offset the utility of regional conditions. A number of commenters objected to the 1 acre limit imposed by the proposed general condition. Two commenters said that the 1 acre limit is arbitrary and violates the Administrative Procedures Act because the Corps provided no justification that this limit is necessary. One commenter stated that the acreage limit should be in the text of the NWPs, not the general condition.

A large number of commenters objected to this proposed general condition because it is duplicative of existing programs, such as the Section 401 water quality certification or National Pollutant Discharge Elimination System programs. Two commenters stated that the issuance of a water quality certification by the state or Tribe should be adequate to ensure that the use of the NWP is consistent with water quality standards. Several commenters asserted that states are best suited to determine which actions are necessary to address causes of impairment, allocate pollutant loads, and protect water quality, and that the Corps should defer these matters to the states. Two commenters said that the proposed general condition is redundant with General Condition 9.

Several commenters objected to the use of Clean Water Act Section 303(d) lists to identify impaired waters. A commenter objected to the provisions of proposed General Condition 26 because EPA is currently proposing to revise its regulations for the Total Maximum Daily Load (TMDL) program, upon which the limitations of the proposed general condition are based. This commenter also opposed the proposed general condition because state Section 303(d) lists are constantly changing and not all state lists are available at the same time. One commenter requested clarification whether the TMDL program is the same as the Section 303(d) program for identifying impaired waters. Another commenter asked how the Corps will be able to enforce this general condition when water quality standards may vary from year to year and the Section 303(d) status of individual stream segments may change. Two commenters objected to the proposed general condition because of the subjective criteria used to identified impaired waters on 303(d) lists.

Several commenters objected to making the prospective permittee responsible for demonstrating that the proposed work will not result in further impairment of the waterbody. Many commenters opposed this general condition because it does not explain how the prospective permittee can rebut the presumption and what information is needed to make the rebuttal. Several commenters indicated that, in many cases, it will be impossible to rebut the presumption in General Condition 26 and in other cases much time and money would be required to rebut the presumption. One commenter suggested that the prospective permittee should be required to provide documentation to the district engineer instead of demonstrating that the activity will not result in further impairment of the waterbody.

Several commenters asserted that permittees should be allowed to use compensatory mitigation to ensure that the authorized work will not result in further impairment of the waterbody. Two commenters said that the prohibition against using compensatory mitigation to ensure no further impairment of the waterbody is contrary to General Condition 19 and the last sentence of paragraph (b) of the proposed General Condition. One commenter requested clarification whether the term ''excluding mitigation'' refers to compensatory mitigation. This commenter also asked if avoidance and minimization could be used as documentation that the activity will not cause further impairment of the waterbody.

Three commenters asked if tributaries of impaired waters are also considered impaired and subject to proposed General Condition 26. Several commenters requested clarification whether wetlands adjacent to an impaired waterbody are considered part of that waterbody and subject to the 1 acre limit. One commenter questioned whether the proposed general condition is applied on a watershed or stream reach basis.

Several commenters objected to the inclusion of adjacent wetlands in proposed General Condition 26 because the definition of adjacency is too vague and those wetlands may not have direct hydrologic connections to the waterbody. Three commenters requested

a definition of the term ''adjacent'' as it applies to this general condition. Two commenters said that the general condition should be limited to the impaired waterbody and wetlands with demonstrable hydrologic connections to the impaired waterbody. One commenter recommended that the Corps replace the term ''adjacent'' with ''contiguous'' in this general condition. This commenter also said that, for the purposes of this general condition, adjacent wetlands should not include wetlands downstream of the impaired waterbody. Another commenter said that identifying adjacent wetlands is problematic since impaired waters are identified by segments. This commenter requested guidance on how to identify wetlands that are adjacent to impaired stream segments.

Two commenters said that this general condition should be included in General Condition 25 because impaired waters warrant the same protection as designated critical resource waters. Another commenter said that proposed General Condition 26 should not apply to waters where TMDL water quality management plans have been implemented. Two commenters said that this general condition should not apply to activities that do not result in discharges of the listed pollutant.

One commenter requested clarification whether proposed General Condition 26 applies only to waterbodies that are impaired as a result of the causes listed in the text of the proposed general condition or if other sources of impairment are applicable. Two commenters said that the proposed general condition should apply only to waterbodies that are impaired as a result of the loss of wetlands. Many commenters recommended additional criteria to identify waters that should be subject to this general condition. Suggested criteria include: (1) watersheds that have lost more than 50% of their original wetlands; (2) loss of riparian vegetation that results in greater fluctuations in water temperature; (3) waters identified as impaired through EPA's Index of Watershed Indicators; (4) all waters identified as impaired through the Section 303(d) process; (5) pollutants listed in section 502(6) of the Clean Water Act; (6) waters impaired by hydrological and habitat modification; and (7) waters impaired by pesticides and pathogens.

A number of commenters suggested specific NWPs that should not be subject to proposed General Condition 26. Many commenters said that NWP 3 activities should not be subject to the proposed general condition, because it would result in delays for maintenance activities that have minimal adverse effects on the aquatic environment and are not likely to result in further impairment of these waterbodies. One commenter stated that NWP activities that enhance or restore waters, are necessary for public health and safety, or authorize maintenance activities, should not be subject to the proposed general condition. Various commenters recommended that NWPs 12, 13, 14, 31, and 33 should not be subject to proposed General Condition 26. One commenter said that the proposed general condition should not apply to NWPs 3, 13, 27, 41, 42, and 43 because the activities authorized by these NWPs usually improve water quality. Most NWPs were recommended for exclusion from the proposed general condition.

After considering the comments received in response to the July 21, 1999, **Federal Register** notice, we determined that General Condition 26 should be withdrawn. We believe that the 1/2 acre limit and the 1/10 acre PCN limit on the new and modified NWPs will ensure that the adverse effects are no more than minimal. We also agree with the commenters who stated that the limitation would yield limited, if any, value added for the aquatic environment. We agree that in many cases mitigated NWPs will actually improve the status of the aquatic environment. Finally, we believe that impacts to impaired waters are more appropriately addressed through the Section 401 water quality certification process.

27. Fills Within 100-year Floodplains: We proposed, in the July 21, 1999, **Federal Register** notice, to add a new general condition to the NWPs that would limit the use of certain NWPs in waters of the United States within all 100-year floodplains.

We received many comments supporting or opposing proposed General Condition 27. A large number of commenters said that this general condition should include drainage activities in 100-year floodplains. Several commenters recommended expanding the scope of the proposed general condition to include excavation activities in 100-year floodplains. Many commenters stated that the proposed general condition should be expanded to prohibit all fills in 100-year floodplains. Some commenters expressed concern that the proposed general condition does not address increases in flooding caused by stream channelization activities. One commenter supported proposed General Condition 27 because it will provide protection of essential fish habitat and anadromous fish species.

Many commenters opposed proposed General Condition 27, stating that it would provide few benefits and that it will increase delays and costs for the regulated public. A number of commenters contend that the requirements of the proposed general condition are outside of the scope of the Corps regulatory authority. Many commenters stated that the requirements of proposed General Condition 27 imply that the Corps is expanding its regulatory authority to the entire 100-year floodplain. Several commenters objected to the provisions of this general condition because it duplicates the requirements of other government agencies, especially state and local flood protection regulations and ordinances, as well as the National Flood Insurance Program (NFIP) of the Federal Emergency Management Agency (FEMA). One commenter said that General Condition 27 is contrary to the Administration's initiatives that encourage reuse of brownfields, because most brownfields are located within 100-year floodplains in urban areas.

As a result of our review of the comments received in response to the July 21, 1999, **Federal Register** notice, we have modified proposed General Condition 27 and designated it as General Condition 26, Fills Within 100-year Floodplains. The revised general condition prohibits the use of NWPs 29, 39, 40, 42, 43, and 44 to authorize discharges of dredged or fill material into waters of the United States that result in permanent, above-grade fills within the FEMA-mapped 100-year floodplain of streams below the headwaters. NWPs 12 and 14 can be used to authorize discharges of dredged or fill material resulting in permanent, above-grade fills within the 100-year floodplain of streams below headwaters, provided the permittee notifies the district engineer in accordance with General Condition 13 and the activity complies with FEMA or FEMA-approved local floodplain construction requirements.

In flood fringes of FEMA-mapped 100-year floodplains located within headwater streams, NWPs 12, 14, 29, 39, 40, 42, 43, and 44 can be used to authorize permanent, above grade fills in waters of the United States, provided the prospective permittee notifies the district engineer in accordance with General Condition 13 and provides documentation demonstrating that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. In FEMA-designated floodways of 100-year

floodplains located within headwater streams, NWPs 29, 39, 40, 42, 43, and 44 cannot be used to authorize permanent, above-grade fills in waters of the United States. However, NWPs 12 and 14 can be used to authorize permanent, above-grade fills in waters of the United States within floodways of FEMA-designated 100-year floodplains located within headwater streams, provided the prospective permittee notifies the district engineer in accordance with General Condition 13 and provides documentation demonstrating that the activity complies with FEMA or FEMA-approved local floodplain construction requirements. We believe that these changes, combined with the 1/2 acre maximum acreage limit and 1/10 acre PCN threshold, will ensure protection of the functions and values of floodplains. Definitions of the terms ''flood fringe'' and ''floodway'' are found at 44 CFR 9.4.

We do not agree that this general condition should be extended to drainage and excavation activities within 100-year floodplains, since these activities do not have substantial adverse effects on the flood-holding capacity of 100-year floodplains. Stream channelization activities authorized by NWPs are subject to General Condition 21, which prohibits substantial changes to surface water flow patterns, including downstream flooding. Stream channelization projects are constructed to improve conveyance of water, which may decrease local flooding.

It is important to note that the requirements of this general condition are not a surrogate for the requisite and separate determination by the Corps of minimal adverse effects on the aquatic environment that is required for all NWPs. District engineers will exercise discretionary authority if proposed discharges of dredged or fill material into waters of the United States within 100-year floodplains will result in more than minimal adverse effects (after consideration of mitigation measures) on the aquatic environment.

We do not believe that the modified version of this general condition will unreasonably increase costs for the regulated public. NWP 26 authorized only discharges of dredged or fill material in headwaters and isolated waters and the modified condition allows the use of NWPs in the flood fringe of the headwaters. The Corps study of the economic and workload implications of the proposed NWPs indicates that the revised approach will cost the regulated public roughly one-half the amount the proposal in the July 21, 1999, **Federal Register** would cost. Moreover, we believe that the modifications we have made will actually enhance protection of the aquatic environment. To participate in the NFIP, the permittee must comply with FEMA or FEMA-approved local floodplain construction requirements, which will not impose additional costs. The requirements of this general condition are not an attempt to, and do not, expand the Corps regulatory jurisdiction to areas outside of waters of the United States.

Two commenters stated that the current NWP program complies with Executive Order (E.O.) 11988, Floodplain Management. One of these commenters said that requiring individual permits for the activities prohibited by the proposed general condition is not considered a practicable alternative in the context of E.O. 11988, because it is impractical to require individual permits for all activities in 100-year floodplains.

We concur that the NWP program fully complies with E.O. 11988, including the ''Floodplain Management Guidelines for Implementing E.O. 11988'' issued by the U.S. Water Resources Council and ''Further Advice on Executive Order 11988 Floodplain Management'' issued by the Interagency Task Force on Floodplain Management. ''Further Advice on Executive Order 11988 Floodplain Management'' states that class review of repetitive actions proposed in 100-year floodplains can be conducted in full compliance with E.O. 11988. The NWPs clearly fall within the category of class review of repetitive actions.

Several commenters indicated that requiring individual permits for activities in 100-year floodplains will not provide any benefits because individual permits will be issued with little or no change from the proposed work. These commenters said that it is likely that the Corps will rely on the NFIP standards when assessing impacts on 100-year floodplains. Two commenters said that the requirements of proposed General Condition 27 will remove incentives for project proponents to design their activities to have minimal adverse effects to qualify for NWP authorization. These commenters believe that project proponents will design larger activities with greater environmental impacts when required to request individual permits. One commenter said that the NWPs should authorize fills that result in the loss of less than 2 acres of waters of the United States in 100-year floodplains.

Several commenters stated that the requirements of proposed General Condition 27 should not be more restrictive than FEMA regulations. Numerous commenters indicated that the proposed general condition is contrary to FEMA regulations, which allow fills in the flood fringe of 100-year floodplains. One commenter said that the proposed general condition should be modified to allow the NWPs to authorize activities that comply with NFIP construction standards. One commenter said that proposed General Condition 27 should not apply in areas with FEMA-certified floodplain management programs in place, where the activity has been approved by the local floodplain management agency.

We agree with these comments and have modified this general condition so that the NWPs can be used to authorize activities within flood fringes of 100-year floodplains within headwater streams, provided those activities comply with FEMA or FEMA-approved local floodplain construction requirements and result in minimal adverse effects on the aquatic environment. We do not agree that there should be a 2 acre limit for discharges of dredged or fill material into waters of the United States within 100-year floodplains. The 1/2 acre limit for most of the new NWPs will allow the NWP program to continue to provide a streamlined authorization process for activities with minimal adverse effects on the aquatic environment.

A large number of commenters stated that proposed General Condition 27 will impose additional requirements on local floodplain authorities that will increase their workload. For example, the proposed general condition required local floodplain authorities to determine the extent of 100-year floodplains, determine whether a proposed activity is outside of the 100-year floodplain, and provide documentation that the proposed work will not decrease the flood-holding capacity of the 100-year floodplain.

We agree with these concerns, but believe that the revised general condition will not impose such additional workload requirements on local floodplain authorities.

Many commenters contend that the prohibitions in proposed General Condition 27 are not necessary because the NWPs authorize only activities with minimal adverse effects on the aquatic environment, including floodplains. Several commenters noted that the terms of proposed General Condition 27 impose a ''no effect'' standard on the NWPs instead of a ''minimal adverse effect'' standard.

We agree with these comments. The revised general condition does not

prohibit the use of NWPs 29, 39, 40, 42, 43, and 44 to authorize discharges of dredged or fill material into waters of the United States within flood fringes of 100-year floodplains within headwater streams, provided the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements and results in minimal adverse effects on the aquatic environment. NWPs 12 and 14 can be used to authorize activities in all non-tidal 100-year floodplains, provided those activities comply with FEMA or FEMA-approved local floodplain construction requirements and result in minimal adverse effects on the aquatic environment.

Numerous commenters objected to this general condition because it requires PCNs for all activities. Two commenters requested clarification whether notification to the district engineer is required if the FEMA map or local floodplain map shows that the project site is outside of the 100-year floodplain. Three commenters asked if the PCN requirement in paragraph (a) of the proposed general condition is for all NWPs or only NWPs 21, 29, 39, 40, 42, 43, and 44.

The revised general condition does not require notification for all activities authorized by NWPs 12, 14, 29, 39, 40, 42, 43, and 44. Notification is required only if the proposed activity involves discharges of dredged or fill material into waters of the United States within 100-year floodplains that are mapped through Flood Insurance Rate Maps (FIRMs) published by FEMA or FEMA-approved local floodplain maps.

Numerous commenters said that compensatory mitigation can be used to offset losses of floodplain functions and values, including flood storage, and that the prohibitions in proposed General Condition 27 are unnecessary. Several commenters remarked that floodplain issues are more appropriately addressed through regional conditions. Other commenters suggested that PCNs and discretionary authority should be used instead of prohibitions. Two commenters recommended that the Corps include local floodplain agencies in the agency coordination process to address floodplain concerns.

Compensatory mitigation can be used to ensure that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. Since flood hazards are a national concern, we do not agree that this issue should be addressed solely by regional conditions. Certain NWP activities within 100-year floodplains will be reviewed through the PCN process to ensure that those activities comply with FEMA or FEMA-approved local floodplain construction requirements and result in minimal adverse effects on the aquatic environment. In addition, we believe that the waters of the United States within the mapped floodway have inherently higher wetland functions and values, which should be afforded additional protections.

Several commenters said that proposed General Condition 27 is unnecessary because the proposed modification of General Condition 21 adequately addresses changes to surface water flows, including flooding. Three commenters requested clarification whether runoff from buildings constructed in uplands within 100-year floodplains requires a Section 404 permit. Three commenters asked whether permanent, above-grade fills in uplands within 100-year floodplains are subject to proposed General Condition 27.

We do not agree that General Condition 21 adequately addresses all potential adverse effects to 100-year floodplains. Stormwater runoff from buildings constructed in uplands within 100-year floodplains does not require a Section 404 permit. During reviews of PCNs, district engineers will consider the adverse effects of the proposed activity on the ecological as well as flooding functions and values of 100-year floodplains. Depending on the Corps scope of analysis for the proposed work, district engineers will generally limit their reviews to activities in waters of the United States within 100-year floodplains.

Many commenters addressed problems associated with identifying and mapping 100-year floodplains. One commenter supported the requirement for using up-to-date FEMA maps. Several commenters advocated expanding proposed General Condition 27 to 100-year floodplains not mapped by FEMA on its FIRMs. A large number of commenters indicated that FEMA maps are not accurate and should not be relied upon to identify the extent of 100-year floodplains. Two commenters said that the Corps should map the floodplains. One commenter noted that many FEMA maps do not reflect changes in land use that have occurred since the last FIRM was issued, which makes these maps unreliable.

To effectively implement the requirements of this general condition, and to be consistent with other Federal programs, 100-year floodplains will be identified through the latest FIRMs published by FEMA or FEMA-approved local floodplain maps. If there are no FIRMs or FEMA-approved local floodplain maps available for the area where the proposed work is located, then the requirements of this general condition do not apply. In such cases, the Corps will still consider the impacts of proposed projects through the PCN review process.

Many commenters stated that in areas where there are no FEMA maps or those maps are out of date, local floodplain authorities may be unwilling to certify the extent of the 100-year floodplain without extensive analyses. These commenters said that landowners may have to go through a lengthy and expensive map revision process before the local floodplain authority will provide the documentation required by proposed General Condition 27. Two commenters remarked that the requirement to have a licensed professional engineer certify whether or not the activity is in the 100-year floodplain is too restrictive. These commenters said that this requirement should be modified to allow qualified hydrologists to identify 100-year floodplains in areas not mapped by FIRMs. Several commenters suggested that proposed General Condition 27 should contain a statement requiring the consideration of man-made flood control structures when mapping 100-year floodplains.

The revised general condition does not require local floodplain authorities to certify the extent of 100-year floodplains. In addition, the prospective permittee is not required to have a licensed professional engineer certify whether or not the proposed work is within a 100-year floodplain.

One commenter objected to using FEMA maps, stating that the scale of these maps makes it difficult to determine if a particular parcel is within a 100-year floodplain. Another commenter objected to using FIRMs because they may contain large areas that are within the 100-year floodplain but are not mapped because of inadequate funding. These unmapped areas would place burdens on local governments or the landowners, who would be required to survey the property and map the 100-year floodplain. One commenter objected to proposed General Condition 27, because it would require project proponents to obtain individual permits if they cannot demonstrate that the proposed work is located outside of 100-year floodplains because there are no FEMA or local floodplain maps available for the project sites.

We believe that FIRMs or FEMA-approved local floodplain maps are adequate for the purposes of this general condition. Utilizing existing FIRMs and

FEMA-approved local floodplain maps eliminates the additional burdens on local governments or landowners that existed in the proposed condition. If there are no FIRMs or FEMA-approved local floodplain maps available for the project area, this general condition does not apply.

Several commenters stated that paragraph (b) of proposed General Condition 27 is an illegal delegation of the Corps regulatory authority because it allows FEMA or local floodplain authorities to prohibit the use of NWPs 12 and 14 in 100-year floodplains. Two commenters disapprove of the requirement for prospective permittees to provide, with the notification, a statement from FEMA or the local flood control agency that the proposed work will not increase flooding. One commenter objected to the provisions of paragraph (b) because FEMA regulations require engineering analyses only for work in regulatory floodways. Two commenters recommended modifying paragraph (b) to allow professional engineers to provide documentation to district engineers without submitting it to FEMA or local floodplain authorities for approval.

We have revised this general condition to require the permittee to comply with the appropriate FEMA or FEMA-approved local floodplain construction requirements. These requirements address impacts to base flood elevations and 100-year floodplains to minimize flood damages. The revised general condition does not require engineering analyses on a case-by-case basis.

Two commenters said that the requirements of the proposed general condition will require local floodplain authorities to develop new regulations to address the documentation necessary to comply with paragraph (b), since these are new requirements that are not currently used by local floodplain agencies. These commenters indicated that it would be more appropriate for FEMA to change its regulations to address these documentation requirements. Many commenters stated that FEMA and local floodplain authorities are not equipped to handle the reviews necessary for the rebuttable presumption in paragraph (b) of proposed General Condition 27 because it contains different standards than they currently use. Several commenters disapprove of this general condition because it provides no mechanism to resolve disputes that may occur between FEMA and local floodplain agencies.

We have revised this general condition to require the permittee to comply with FEMA or FEMA-approved local floodplain construction requirements. If those construction requirements change, the permittee would have to comply with the new construction requirements.

Several commenters indicated that the criteria in paragraph (b) of proposed General Condition 27 (i.e., no more than minimal alteration of the hydrology, flow regime, or volume of waters associated with the floodplain) are not well-defined in current FEMA regulations or the guidance for implementing local floodplain regulations. These commenters said that most states do not use these criteria when assessing impacts to 100-year floodplains. Two commenters suggested that the Corps consult with state floodplain regulatory agencies and Federal transportation agencies to develop language that makes this condition practical to implement. Another commenter recommended that other factors, such as the width of the drainage course, slope, roughness coefficients, and location of above-grade fills within the 100-year floodplain should be considered.

We have removed these criteria from this general condition. Instead, we will rely on FEMA or FEMA-approved local floodplain construction requirements to ensure that the authorized work does not result in more than minimal adverse effects to the flood-holding capacity of 100-year floodplains.

One commenter identified inconsistencies between the second and fourth sentences of paragraph (b). The second sentence states that the '' * * * project and associated mitigation, will not decrease flood-holding capacity and no more than minimally alter the hydrology, flow regime, or volume of waters associated with the floodplain.'' The fourth sentence states that the project ''* * * will not result in increased flooding or more than minimally alter floodplain hydrology or flow regimes.'' Since the documentation requirements of these sentences differ, the commenter was unsure as to what constitutes the criteria that will be used to determine compliance with the proposed general condition.

The revised general condition does not contain these inconsistencies.

Two commenters stated that the proposed general condition should apply to NWP activities in smaller tributaries, in addition to the main river. One commenter said that tributaries to streams should be considered as separate watersheds and eligible for the exception in paragraph (c) of proposed General Condition 27. This commenter requested criteria that will be used to determine whether a tributary is separate from the floodplain of the main channel. Another commenter contends that paragraph (c) of the proposed general condition is too confusing and requested clarification explaining how district engineers and prospective permittees would determine if a particular site is located in the portion of the watershed that drains less than one square mile.

This general condition applies to activities authorized by NWPs 12, 14, 29, 39, 40, 42, 43, and 44, where 100-year floodplains are delineated on either FIRMs or FEMA-approved floodplain maps. If no 100-year floodplain map has been produced for a particular tributary, then the provisions of this general condition do not apply. The revised general condition does not contain a provision similar to paragraph (c) of the proposed General Condition 27.

Several commenters suggested that the rebuttable presumption in paragraph (b) should be utilized for NWPs 21, 29, 39, 40, 42, 43, and 44, instead of prohibiting these activities in 100-year floodplains. One commenter recommended expanding proposed General Condition 27 to NWPs 7, 8, 16, and 17. Several commenters said that proposed General Condition 27 should not apply to the construction, replacement, and maintenance of water supply facilities, fish production facilities, flood control facilities, and hydraulic control and drainage facilities. Three commenters indicated that the proposed general condition should not apply to NWP 27 activities.

We have revised the proposed general condition to require, for NWP 29, 39, 40, 42, 43, and 44 activities in flood fringes of the 100-year floodplains within headwater streams, that the permittee notify the district engineer in accordance with General Condition 13 and provide documentation demonstrating that the proposed work complies with FEMA or FEMA-approved local floodplain construction regulations. We have withdrawn NWP 21 from the general condition. We do not agree that this general condition should apply to NWPs 7, 8, and 16 because the activities authorized by these NWPs have little or no adverse effects on the flood-holding capacity of 100-year floodplains. Hydropower projects authorized by NWP 17 would be required to comply with the appropriate floodplain construction requirements. This general condition does not apply to water supply facilities, fish production facilities, flood control facilities, and hydraulic control and drainage facilities, unless those activities are authorized by the NWPs listed in the general condition.

NWP 27 is not subject to this general condition.

Many commenters said that proposed General Condition 27 should not apply to NWP 12 activities. One commenter suggested a ⅓ acre limit for utility line activities in 100-year floodplains. Another commenter stated that the installation of above-ground utility line valves within 100-year floodplains should not be subject to the hydraulic modeling requirements of paragraph (b) because these activities have minor adverse effects on flood-holding capacity. Several commenters said that the requirements of paragraph (b) should not apply to utility lines that are installed underground. Three commenters said that permanent above-grade fills within 100-year floodplains for utility line activities should not be authorized by NWP 12.

We do not agree that NWP 12 activities should be excluded from this general condition. Utility line activities can adversely affect the flood-holding capacity of the 100-year floodplain. NWP 12 activities are required to comply with the appropriate FEMA or FEMA-approved local floodplain construction requirements.

Numerous commenters stated that proposed General Condition 27 should not apply to NWP 14 activities. One commenter said that the proposed general condition should apply only to transportation crossings that are constructed parallel to streams. A commenter suggested a ⅓ acre limit for NWP 14 activities in 100-year floodplains. One commenter said that restricting NWP 14 activities in 100-year floodplains could adversely affect public safety.

NWP 14 activities can adversely affect the flood-holding capacity of 100-year floodplains, as well as surface water flow patterns during flood events. The revised general condition does not prohibit NWP 14 activities in 100-year floodplains. NWP 14 activities must comply with the appropriate FEMA or FEMA-approved local floodplain construction requirements.

Many commenters said that proposed General Condition 27 should not apply to activities authorized by NWP 21 because all coal mining is regulated by the Office of Surface Mining (OSM) and delegated state agencies. Some of these commenters indicated that state mining programs have extensive performance standards for hydrological balance, which address similar issues as proposed General Condition 27. Numerous commenters stated that OSM-approved state programs have requirements to restore mined areas to approximately the original contours and that prohibiting the use of NWP 21 in 100-year floodplains will place burdens on the mining industry without providing any additional benefits.

We concur with these commenters and have removed NWP 21 from the revised general condition.

One commenter stated that, for activities authorized by paragraph (a) of NWP 40, NRCS would have to determine if the proposed work will result in unacceptable impacts on FEMA-mapped 100-year floodplains. This commenter said that NRCS, as part of its review, addresses impacts on flood storage and flood flows and that prospective permittees should be allowed to use NWP 40 if the work will not result in impacts to 100-year flood events. This commenter also recommended incorporating the requirements of proposed General Condition 27 into the text of NWP 40 so that the regulated public will be aware of these requirements.

For activities authorized by paragraph (a) of NWP 40, NRCS will determine if the proposed work complies with this general condition. We have added paragraph (e) to NWP 40, which refers permittees to General Condition 26.

Many commenters objected to applying the prohibition in paragraph (a) of proposed General Condition 27 to NWP 43 activities. A number of these commenters said that this prohibition is inappropriate since stormwater management facilities must be located in or near 100-year floodplains and their purpose is floodplain management and flood control. Several commenters said that prohibiting NWP 43 activities in 100-year floodplains will put citizens at greater risks and make their property more susceptible to flood damage. One commenter stated that proposed General Condition 27 should not apply to the maintenance of existing flood control projects.

We do not agree that NWP 43 should be excluded from this general condition. NWP 43 activities must comply with FEMA or FEMA-approved local floodplain construction requirements, if the activity is located in flood fringes of 100-year floodplains of headwater streams. Furthermore, many in-stream stormwater management facilities are located above the 1 cfs point on streams. General Condition 26 does not apply above the 1 cfs point, thus these projects will not be affected. The revised general condition does not apply to NWP 31 activities.

Many commenters stated that proposed General Condition 27 should not apply to NWP 44 activities because it would not provide any added benefits. Some of these commenters said that aggregate mining activities often increase flood storage capacity and therefore should not be prohibited by this general condition. Several commenters suggested that NWP 44 activities should be subject to the rebuttable presumption in paragraph (b) of the proposed general condition. One commenter said that the proposed general condition should not apply to aggregate mining activities because sand and gravel deposits are typically located within floodplains and off-site alternatives are usually impractical. This commenter also stated that mined land reclamation will restore surface water flow patterns. A commenter noted that dikes, berms, foundations, and impoundments associated with mining activities can be located so that they will not restrict the flow of floodwaters.

We do not agree that NWP 44 should be excluded from this general condition, because permanent, above-grade fills associated with mining activities can adversely affect the flood-holding capacity of 100-year floodplains. Mining activities that do not result in permanent above-grade fills are not subject to the requirements of this general condition.

The Corps of Engineers is very concerned with the loss of life and property resulting from unwise development in the floodplain. The Corps has recently advocated the strengthening of floodplain policy and the use of non-structural measures to reduce flood damages. We believe that the changes to the NWP program published today will play an important role in reducing damages associated with development in the floodplain. We will monitor carefully the effectiveness of the new floodplain condition to ensure that it has the intended impact on reducing floodplain development. Specifically, three years from the effective date of the new NWPs, we will prepare a report on the use of NWPs in the flood fringe area in the headwaters. This report will include an analysis of the extent, if any, to which NWPs are being used in the floodplain of areas with repeated flood damages.

Proposed General Condition 27 is adopted as General Condition 26, with the modifications discussed above.

V. Comments and Responses on Nationwide Permit Definitions

We received many comments concerning the proposed definitions for the NWPs. Comments regarding specific definitions are discussed below. In this section, we also address requests for definitions of additional terms used in the NWP program. One commenter said that certain terms defined in the

''Definitions'' section do not appear in the text of NWPs and that they should be removed. This commenter cited the definitions of ''aquatic bench'' and ''ephemeral streams.'' Another commenter objected to the differential treatment of perennial, intermittent, and ephemeral streams, stating that each stream type has important functions and values and that the proposed NWPs imply that ephemeral streams are less valuable.

We have deleted the definition of the term ''aquatic bench,'' since it is not used in the new NWPs. We believe that it is necessary to retain the definition of the term ''ephemeral stream'' because it is important to recognize the differences between perennial, intermittent, and ephemeral streams when determining whether a particular project will have more than minimal adverse effects on the aquatic environment. For example, NWP 43 does not authorize the construction of new stormwater management facilities in perennial streams. Division engineers can also regionally condition these NWPs to address regional concerns for different stream types.

Best Management Practices. One commenter recommended adding ''and wetlands'' after the phrase ''surface water quality.''

We do not agree that this change is necessary, because wetlands are surface waters. This definition is adopted as proposed.

Compensatory Mitigation. One commenter stated that the requirement in the new NWPs for vegetated buffers adjacent to open waters is inconsistent with the proposed definition of compensatory mitigation, because that definition does not recognize vegetated buffers as a form of compensatory mitigation. Another commenter recommended revising the definition to recognize the use of upland areas to provide out-of-kind compensatory mitigation. One commenter said that the definition of this term should include references to mitigation banks and in lieu fee programs. One commenter said that the word ''unavoidable'' in the definition is confusing and should be removed.

The establishment and maintenance of vegetated buffers next to open waters, including streams, is not inconsistent with the proposed definition of this term. An integral component of stream restoration projects is the reestablishment of the riparian zone, which may involve planting trees and shrubs next to the stream to restore aquatic habitat. It is not necessary to include mitigation banks and in lieu fee programs in the definition of this term because these are specific forms of compensatory mitigation. The word ''unavoidable'' is an integral part of this definition because the NWPs require on-site avoidance and minimization of losses of waters of the United States, to the maximum extent practicable (see General Condition 19). This definition is adopted as proposed.

Creation: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Drainage Ditch. Several commenters noted that the term ''ordinary high water line,'' which is used in the proposed definition of this term, is not defined in Corps regulations. These commenters asked if we intended to refer to the ''ordinary high water mark.'' Several commenters stated that channelized streams should not be included in this definition. One commenter recommended that this definition differentiate between channelized streams and drainage ditches by stating that channelized streams convey water from high water tables. Another commenter objected to a statement in the preamble discussion related to this definition (64 FR 39351) that the maintenance of drainage ditches which are constructed by channelizing streams is exempt from Section 404 permit requirements as long as the maintenance activity does not exceed the original ditch design and configuration. Two commenters requested that the Corps add structural drainage ditches and channels to the definition of this term.

One commenter said that a clear definition of the term ''upland drainage ditch'' is needed. Another commenter objected to the second sentence of the proposed definition, stating that drainage ditches are jurisdictional only when they are constructed in waters of the United States. This commenter indicated that the entire drainage ditch should become jurisdictional if any part of that drainage ditch is constructed in waters of the United States.

We have withdrawn the proposed definition of this term from the ''Definitions'' section of the NWPs, because of the complexity of the jurisdictional issues related to drainage ditches.

Enhancement: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Ephemeral Stream. Several commenters recommended modifying the proposed definition of this term to state that ephemeral streams are not waters of the United States as defined at 33 CFR 328.3(a)(3). These commenters also noted that in the July 1, 1998, **Federal Register** notice (63 FR 36042), the Corps defined the term stream bed as including only perennial and intermittent streams.

We do not agree that it is necessary to explicitly state in the definition of this term that ephemeral streams are not waters of the United States because such a statement would be inaccurate. An ephemeral stream that meets the criteria at 33 CFR part 328 is a water of the United States. We acknowledge that we made an error on page 36042 of the July 1, 1998, **Federal Register** notice. Our intent was to clarify that the PCN thresholds for stream bed impacts for the proposed NWPs apply only to perennial and intermittent stream beds, not ephemeral stream beds. The term ''stream bed,'' as used for the NWPs, applies to perennial, intermittent, and ephemeral stream beds. This definition is adopted as proposed.

Farm tract: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Independent utility: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Intermittent stream: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Loss of Waters of the United States. During our review of the comments received in response to the July 21, 1999, **Federal Register** notice, we found an error in the proposed definition of the term ''loss of waters of the United States.'' In the fourth sentence of the draft definition, we stated that the loss of stream bed includes the linear feet of perennial or intermittent stream bed that is filled or excavated. This statement is inaccurate because ephemeral stream bed that is filled or excavated can also be considered a loss of waters of the United States. However, the 300 linear foot limit for stream beds filled or excavated does not apply to ephemeral streams. We have modified this sentence to define the loss of stream bed as the linear feet of stream bed that is filled or excavated.

One commenter requested clarification whether the definition of this term refers only to permanent losses. This commenter also said that the proposed definition implies that all permanent losses of waters of the United States, no matter how small, are considered. Several commenters stated that only permanent losses of waters of the United States should be regulated by the Corps. Another commenter suggested that temporary losses should

be included in the measurement of loss of waters of the United States.

All permanent losses of waters of the United States are considered when calculating the amount of loss of waters of the United States to determine whether a particular activity complies with the acreage or linear limits of an NWP. All discharges of dredged or fill material into waters of the United States resulting in permanent or temporary losses of waters of the United States are regulated by the Corps, unless they are specifically exempt under Section 404(f) of the Clean Water Act. We do not agree that temporary losses of waters of the United States should be included in the threshold measurement to determine whether a activity may qualify for an NWP, since these areas revert back to waters of the United States once they are restored.

One commenter asked if the term ''loss of waters of the United States'' includes the removal of silt that has accumulated in a channel. Another commenter said that the proposed definition is so broad that it would include any effect, not just losses. This commenter said that it is not clear whether maintenance dredging of flood control channels to restore design grades is considered a loss of waters of the United States. One commenter objected to the third sentence of the proposed definition, stating that this sentence is inconsistent with Corps practice of considering compensatory mitigation when determining whether the adverse effects on the aquatic environment are minimal. A commenter suggested that the Corps consider the entire single and complete project to determine the amount of loss of waters of the United States and whether the adverse effects are minimal.

The term ''loss of waters of the United States'' does not include maintenance dredging activities that remove accumulated sediments, provided the dredged material is deposited in upland disposal sites. An exception occurs where the channel has accumulated so much sediment that wetlands have developed in the channel and the removal of those wetlands are necessary to reconstruct the channel. In that situation, we would consider the activity to result in a loss of waters of the United States. However, in most situations mitigation is not required for the cyclical removal of vegetation during maintenance activities.

The third sentence of this definition is not inconsistent with our policy of using compensatory mitigation to determine whether the net adverse effects of a particular activity on the aquatic environment are minimal. This part of the definition merely states that compensatory mitigation cannot be used to offset a loss of waters of the United States to meet the acreage limit of an NWP. For example, a project proponent cannot create ½ acre of wetlands to change a ¾ acre loss of wetlands to a ¼ acre loss of wetlands (see paragraph (b) of General Condition 19). However, the district engineer will consider compensatory mitigation when determining whether the net adverse effects on the aquatic environment are minimal.

One commenter said that this definition should also include long-term, but temporary, impacts to aquatic resource functions and values. Another commenter stated that discharges of dredged or fill material into waters of the United States to construct compensatory mitigation projects should be included in the measurement of loss of waters of the United States because these projects do not always succeed.

District engineers will determine, on a case-by-case basis whether an activity results in permanent or temporary losses of waters of the United States. We do not agree that impacts due to the construction of compensatory mitigation projects should be included in the measurement of loss of waters of the United States because these activities offset losses of waters of the United States. This definition is adopted with the modification discussed above.

Non-tidal wetland. One commenter said that the third sentence of the proposed definition is not accurate because it changes the definition of high tide line. This commenter believes that the maximum height of the tide is not the spring high tide.

The spring high tide line is the normal high tide line that occurs during the tidal cycle. Water levels higher than spring high tides result from storm surges, which are not part of the normal tidal cycle. This definition is retained as proposed.

Open Water. Two commenters stated that the proposed definition of this term is confusing and asked whether all waters of the United States that have ordinary high water marks are open waters. These commenters also inquired whether this term applies to other areas, such as ephemeral washes, arroyos, and vernal pools, that are not inundated for sufficient amounts of time to develop OHWMs and may not be waters of the United States. Two commenters said that the definition of this term should specifically exclude ephemeral washes. One commenter requested that the Corps clarify whether or not all waters of the United States have an OHWM.

To clarify this definition, we have modified the second sentence to state that open waters either have little or no emergent aquatic vegetation. Vegetated shallows are considered to be open waters. Waters of the United States with substantial amounts of emergent aquatic vegetation are wetlands, which may or may not have an OHWM. An ephemeral wash, arroyo, or vernal pool that does not have an OHWM is not a water of the United States, unless that area has wetlands that meet the criteria in 33 CFR part 328. We have added a sentence to the definition which states that ephemeral waters are not considered open waters, for the purposes of the NWPs. The definition of this term is adopted with the modifications discussed above.

Perennial stream. One commenter recommended that the Corps modify the proposed definition to state that the water table ''discharges'' into the stream for most of the year.

We do not agree with this comment, because using the word ''discharge'' in this definition is likely to create confusion since certain NWPs authorize discharges of dredged or fill material into waters of the United States for specific activities. The definition is adopted as proposed.

Permanent above-grade fill. Several commenters requested a more explicit definition of the word ''permanent'' as used in the context of this term. One commenter asked for clarification of what is considered ''above-grade'' for the purposes of this definition. One commenter said that any discharge of dredged or fill material into waters of the United States should be considered an above-grade fill.

District engineers will determine, on a case-by-case basis, what constitutes a permanent, above-grade fill for the purposes of this definition and General Condition 26. Not all discharges of dredged or fill material into waters of the United States result in permanent, above-grade fills. For example, during the installation of an underground utility line, a wetland could be excavated and backfilled with no permanent change in grade. We believe the definition is adequately clear.

One commenter expressed concern that the use of the word ''substantial'' in the definition of this term would prohibit stockpiling in 100-year floodplains during sand and gravel mining operations. Another commenter requested that the last sentence of this definition specifically state which NWPs are excluded from this definition, and whether NWP 12 is one of the excluded NWPs.

Temporary stockpiles of materials during mining operations would not be considered permanent above-grade fills for the purposes of this definition and General Condition 26. The exclusion in the last sentence of this definition applies to all structural discharges authorized by NWPs, except for structural discharges that are authorized by the NWPs listed in General Condition 26 (i.e., NWPs 12, 14, 29, 39, 40, 42, 43, and 44). This definition is adopted as proposed.

Playa. Many commenters objected to the proposed definition of this term, stating that this type of aquatic habitat is found throughout the country. Various commenters suggested additional geographic areas that should be included, such as Oklahoma, Colorado, Kansas, Oregon, Washington, and Idaho. Another commenter objected to the inclusion of the word ''small'' in the proposed definition because some playas can be large in size. This commenter also objected to including the phrase ''emergent hydrophytic vegetation'' in the definition because many playas do not support vegetation.

Since we have removed the indexed acreage limit for discharges of dredged or fill material into playas, prairie potholes, and vernal pools from NWP 40, therefore we have removed the proposed definition of a playa.

Prairie pothole. Many commenters objected to the proposed definition of this term, stating that this type of aquatic habitat is found throughout the country.

Since we have removed the indexed acreage limit for discharges of dredged or fill material into playas, prairie potholes, and vernal pools from NWP 40, we have removed the proposed definition of prairie pothole.

Preservation: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Project Area. One commenter objected to the inclusion of open space in the definition of this term, because the commenter believes that it penalizes the permittee for avoiding impacts to waters of the United States. Another commenter said that the exclusion of public roads from the definition of ''project area'' is unnecessary because the public roads would not have been built unless the subdivision was constructed.

Since we have replaced the indexed acreage limit of NWP 39 with a simple ½ acre limit, we have deleted the proposed definition of project area from this section.

Restoration. One commenter recommended deleting the phrase ''or exist in a substantially degraded state'' from the definition of this term, because it overlaps with the definition of the term ''enhancement.''

The definition of this term was taken from the ''Federal Guidance for the Establishment, Use and Operation of Mitigation Banks'' that was published in the November 28, 1995, **Federal Register** (60 FR 58605). Therefore, we cannot make the recommended change because this guidance is still in effect. The definition is adopted as proposed.

Riffle and Pool Complex. One commenter suggested that this term apply only to perennial streams and not to intermittent or ephemeral streams. This commenter also recommended inserting the word ''moderately'' before the word ''steep'' in the second sentence of this definition because stream beds with steep gradients seldom have riffle and pool complexes.

The definition of this term was taken from 40 CFR 230.45. Therefore, we will not modify the definition of this term for the purposes of the NWPs. District engineers will use their judgement to identify riffle and pool complexes at project sites and to distinguish between riffle and pool complexes (which are found in areas with moderate grades) and step-pool complexes (which are found in areas with steep grades, where the stream bed material consists mostly of boulders and large rocks). The definition is adopted as proposed.

Single and Complete Project. One commenter said that the criteria for linear single and complete projects should be the same as for other activities.

We do not agree with this comment. The definition of single and complete linear projects is consistent with the current NWP regulations at 33 CFR 330.2(i). This definition is adopted as proposed.

Stormwater management. Several commenters objected to the proposed definition, stating that it does not specifically include facilities that reduce downstream flooding. These commenters said that the definition should include flood control facilities so that they can be authorized by NWP 43.

The proposed definition does consider flooding and the definition of its related term, ''stormwater management facilities,'' addresses flooding issues by discussing runoff in the definition. NWP 43 can be used to authorize certain types of flood control facilities, if they are constructed to control runoff and reduce flooding impacts. This definition is adopted as proposed.

Stormwater management facilities. Two commenters said that this definition should distinguish between facilities that are designed to protect water quality and facilities that are designed for flood control purposes.

We disagree with these commenters because stormwater management facilities usually perform both functions by slowing runoff during storms and trapping sediments and chemical compounds. This definition is adopted as proposed.

Stream bed: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Stream channelization. One commenter requested that the Corps modify the definition of this term to more specifically identify what constitutes stream channelization. Another commenter said that the definition should contain a statement that excavation activities are not regulated by the Corps. Two commenters stated that this definition should include definitions for the terms ''structures'' and ''fills'' so that the regulated public will know when the maintenance of these structures and fills is eligible for NWP 3 or the maintenance exemption in section 404(f) of the Clean Water Act.

The proposed definition already provides sufficient examples of activities that may result in stream channelization. District engineers will determine on a case-by-case basis whether a particular activity involves stream channelization. We discuss the regulation of excavation activities in waters of the United States in a previous section of this **Federal Register** notice and do not believe it is necessary to address that issue in this definition. We do not agree that it is necessary to provide definitions of the terms ''structure'' and ''fill'' in the definition of this term. This definition is adopted as proposed.

Tidal Wetland. One commenter stated that the term ''spring high tide'' should be replaced with the phrase ''mean high tide'' to make the definition consistent with the provisions of section 10 of the Rivers and Harbors Act.

Although the shoreward limit of jurisdiction for section 10 of the Rivers and Harbors Act is mean (average) high water (see 33 CFR 329.12(a)(2)), spring high tides are waters of the United States under Section 404 of the Clean Water Act (see 33 CFR 328.3(d) and (f)). Tidal wetlands are wetlands that are inundated with tidal waters, including spring high tides. Therefore, this definition is adopted as proposed.

Vegetated Shallows. One commenter suggested inserting the phrase

''submerged or floating'' before the word ''vegetation'' in the proposed definition.

The proposed definition was taken from the definition of vegetated shallows published at 40 CFR 230.43 and we do not agree that the recommended change is necessary. This definition is adopted as proposed.

Vernal pool. Many commenters objected to the proposed definition of this term, stating that this type of aquatic habitat is found throughout the country. One commenter stated that not all regions with vernal pools exhibit the ''Mediterranean'' climates cited in the proposed definition.

Since we have removed the indexed acreage limit for discharges of dredged or fill material into playas, prairie potholes, and vernal pools from NWP 40, we have removed the proposed definition of vernal pools from this section.

Waterbody. One commenter suggested that the word ''contiguous'' in the second sentence of the proposed definition should be replaced with the word ''adjacent.''

We disagree with this recommendation, because wetlands that are adjacent to a waterbody are not necessarily part of the waterbody, unless there is a direct, surface water connection (i.e., contiguous) between the wetland and the waterbody. This definition is adopted as proposed.

Additional Definitions. Several commenters recommended that the Corps include definitions of other terms in this section of the NWPs. These comments are addressed below.

One commenter said that the phrase ''minimal effects on the aquatic environment'' needs to be precisely defined so that users of NWPs will know the extent of adverse effects authorized by the NWPs. Two commenters suggested adding definitions of the terms ''isolated waters'' and ''headwaters.'' One of these commenters requested a definition of the term ''excavation.'' One commenter said that a definition of the term ''upland'' as it is used in the context of NWPs 39, 43, and 44 is needed. Two commenters asked for a definition of the phrase ''utility line substations'' as used in NWP 12. Another commenter requested a definition of the term ''practicable'' as it is used in General Condition 21. This commenter recommended adopting the definition in the Section 404(b)(1) guidelines.

We cannot provide a national definition of the term ''minimal effects on the aquatic environment'' because the determination of minimal adverse effects for the NWPs and other general permits must be made on a case-by-case basis, by considering site characteristics, the functions and values of waters of the United States, the quality of those waters, regional differences in aquatic resource functions and values, and other factors. Definitions of the terms ''isolated waters'' and ''headwaters'' are found at 33 CFR 330.2(e) and 33 CFR 330.2(d), respectively. We do not agree that it is necessary to provide a definition of the terms ''excavation,'' ''uplands,'' or ''utility line substations.'' The Corps regulatory program uses the definition of the term ''practicable'' found at 40 CFR 230.3(q).

One commenter requested a definition of the term ''non-tidal wetlands adjacent to tidal waters'' because the word ''adjacent'' can be broadly defined. This commenter recommended limiting the phrase ''non-tidal wetlands adjacent to tidal water'' to wetlands that are found between the mean tide line and the spring high tide line; wetlands landward of the spring high tide line would not be considered adjacent to tidal waters.

As discussed in a previous paragraph in this section, wetlands located between the mean high tide line and the spring high tide line are tidal wetlands, because they are inundated with tidal waters. Non-tidal wetlands that are landward of the spring high tide line and bordering, contiguous, or neighboring to tidal waters are adjacent to tidal waters. District engineers will determine, on a case-by-case basis, whether a particular non-tidal wetland is adjacent to tidal waters.

One commenter recommended including a more detailed definition of the term ''lower perennial stream'' that is developed from the Cowardin definition and discusses the stream gradient, water velocity, stream substrate, faunal composition, and floodplain development of the lower perennial stream.

Since the term ''lower perennial stream'' is used only in the context of NWP 44, we have provided a modified version of the Cowardin definition in the text of this NWP. This modified definition describes the stream gradient, stream flow, water velocity, and the stream substrate. We do not agree that it is necessary to address the type of organisms that inhabit lower perennial streams, since the physical description of these stream segments is adequate for the purposes of NWP 44.

One commenter suggested that the Corps include a definition of the term ''vegetated buffer'' in this section. We concur with this comment and have added a definition of this term to the ''Definitions'' section of the NWPs.

For the implementation of General Condition 26, we have also added definitions of the terms ''flood fringe'' and ''floodway'' to this section. These definitions were taken from 44 CFR 9.4, FEMA's regulations for floodplain management and protection of wetlands.

Alabama

Mobile District Engineer, ATTN: CESAM–OP–S, 109 St. Joseph Street, Mobile, AL 36602–3630

Alaska

Alaska District Engineer, ATTN: CEPOA–CO–R, P.O. Box 898, Anchorage, AK 99506–0898

Arizona

Los Angeles District Engineer, ATTN: CESPL–CO–R, P.O. Box 2711, Los Angeles, CA 90053–2325

Arkansas

Little Rock District Engineer, ATTN: CESWL–ET–WR, P.O. Box 867, Little Rock, AR 72203–0867

California

Sacramento District Engineer, ATTN: CESPK–CO–R, 1325 J Street, Sacramento, CA 95814–4794

Colorado

Albuquerque District Engineer, ATTN: CESPA–OD–R, 4101 Jefferson Plaza NE, Room 302, Albuquerque, NM 87109–3435

Connecticut

New England District Engineer, ATTN: CENAE–OD–R, 696 Virginia Road, Concord, MA 01742–2751

Delaware

Philadelphia District Engineer, ATTN: CENAP–OP–R, Wannamaker Building, 100 Penn Square East Philadelphia, PA 19107–3390

Florida

Jacksonville District Engineer, ATTN: CESAJ–RD, P.O. Box 4970, Jacksonville, FL 32202–4412

Georgia

Savannah District Engineer, ATTN: CESAS–OP–F, P.O. Box 889, Savannah, GA 31402–0889

Hawaii

Honolulu District Engineer, ATTN: CEPOH–CO–O, Building 230, Fort Shafter, Honolulu, HI 96858–5440

Idaho

Walla Walla District Engineer, ATTN: CENWW–OD–RF, 210 N. Third Street, City-County Airport, Walla Walla, WA 99362–1876

Illinois

Rock Island District Engineer, ATTN: CEMVR–RD, P.O. Box 004, Rock Island, IL 61204–2004

Indiana

Louisville District Engineer, ATTN: CELRL–OR–F, P.O. Box 59, Louisville, KY 40201–0059

Iowa

Rock Island District Engineer, ATTN: CEMVR–RD, P.O. Box 2004, Rock Island, IL 61204–2004

Kansas

Kansas City District Engineer, ATTN: CENWK–OD–R, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106–2896

Kentucky

Louisville District Engineer, ATTN: CELRL–OR–F, P.O. Box 59, Louisville, KY 40201–0059

Louisiana

New Orleans District Engineer, ATTN: CEMVN–OD–S, P.O. Box 60267, New Orleans, LA 70160–0267

Maine

New England District Engineer, ATTN: CENAE–OD–R, 696 Virginia Road, Concord, MA 01742–2751

Maryland

Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715

Massachusetts

New England District Engineer, ATTN: CENAE–OD–R, 696 Virginia Road, Concord, MA 01742–2751

Michigan

Detroit District Engineer, ATTN: CELRE–CO–L, P.O. Box 1027, Detroit, MI 48231–1027

Minnesota

St. Paul District Engineer, ATTN: CEMVP–CO–R, 190 Fifth Street East, St. Paul, MN 55101–1638

Mississippi

Vicksburg District Engineer, ATTN: CEMVK–OD–F, 4155 Clay Street, Vicksburg, MS 39183–3435

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Nebraska

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Nevada

Sacramento District Engineer, ATTN: CESPK–CO–R, 1325 J Street, Sacramento, CA 95814–2922

New Hampshire

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New Jersey

Philadelphia District Engineer, ATTN: CENAP–OP–R, Wannamaker Building, 100 Penn Square East, Philadelphia, PA 19107–3390

New Mexico

Albuquerque District Engineer, ATTN: CESPA–OD–R, 4101 Jefferson Plaza NE, Room 302, Albuquerque, NM 87109–3435

New York

New York District Engineer, ATTN: CENAN–OP–R, 26 Federal Plaza, New York, NY 10278–9998

North Carolina

Wilmington District Engineer, ATTN: CESAW–RG, P.O. Box 1890, Wilmington, NC 28402–1890

North Dakota

Omaha District Engineer, ATTN: CENWO–OP–R, 215 North 17th Street, Omaha, NE 68102–4978

Ohio

Huntington District Engineer, ATTN: CELRH–OR–F, 502 8th Street, Huntington, WV 25701–2070

Oklahoma

Tulsa District Engineer, ATTN: CESWT–PE–R, 1645 South 101st East Avenue, Tulsa, OK 74128–4609

Oregon

Portland District Engineer, ATTN: CENWP–OP–G, P.O. Box 2946, Portland, OR 97208–2946

Pennsylvania

Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715

Rhode Island

New England District Engineer, ATTN: CENAE–OD–R, 696 Virginia Road, Concord, MA 01742–2751

South Carolina

Charleston District Engineer, ATTN: CESAC–CO–P, P.O. Box 919, Charleston, SC 29402–0919

South Dakota

Omaha District Engineer, ATTN: CENWO–OP–R, 215 North 17th Street, Omaha, NE 68102–4978

Tennessee

Nashville District Engineer, ATTN: CELRN–CO–F, P.O. Box 1070, Nashville, TN 37202–1070

Texas

Ft. Worth District Engineer, ATTN: CESWF–EV–R, P.O. Box 17300, Ft. Worth, TX 76102–0300

Utah

Sacramento District Engineer, ATTN: CESPK–CO–R, 1325 J Street, CA 95814–2922

Vermont

New England District Engineer, ATTN: CENAE–OD–R, 696 Virginia Road, Concord, MA 01742–2751

Virginia

Norfolk District Engineer, ATTN: CENAO–CO–R, 803 Front Street, Norfolk, VA 23510–1096

Washington

Seattle District Engineer, ATTN: CENWS–OD–RD, P.O. Box 3755, Seattle, WA 98124–2255

West Virginia

Huntington District Engineer, ATTN: CELRH–OR–F, 502 8th Street, Huntington, WV 25701–2070

Wisconsin

St. Paul District Engineer, ATTN: CEMVP–CO–R, 190 Fifth Street East, St. Paul, MN 55101–1638

Wyoming

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District of Columbia

Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715

Pacific Territories

Honolulu District Engineer, ATTN: CEPOH–CO–O, Building 230, Fort Shafter, Honolulu, HI 96858–5440

Puerto Rico and Virgin Islands

Jacksonville District Engineer, ATTN: CESAJ–RD, P.O. Box 4970, Jacksonville, FL 32202–4412

Date: February 28, 2000.

Hans A. Van Winkle,

Deputy Commander for Civil Works.

Accordingly, these Nationwide Permits are issued as follows:

Nationwide Permits, Conditions, Further Information, and Definitions

A. Index of Nationwide Permits, Conditions, Further Information, and Definitions

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44. Mining Activities

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2. Proper Maintenance
3. Soil Erosion and Sediment Controls
4. Aquatic Life Movements
5. Equipment
6. Regional and Case-by-Case Conditions
7. Wild and Scenic Rivers
8. Tribal Rights
9. Water Quality
10. Coastal Zone Management
11. Endangered Species
12. Historic Properties
13. Notification
14. Compliance Certification
15. Use of Multiple Nationwide Permits.
16. Water Supply Intakes
17. Shellfish Beds
18. Suitable Material
19. Mitigation
20. Spawning Areas
21. Management of Water Flows
22. Adverse Effects from Impoundments
23. Waterfowl Breeding Areas
24. Removal of Temporary Fills
25. Designated Critical Resource Waters
26. Fills Within 100-year Floodplains

Further Information

Definitions

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Enhancement
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Farm tract
Flood Fringe
Floodway
Independent utility
Intermittent stream
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Non-tidal wetland
Open water
Perennial stream
Permanent above-grade fill
Preservation
Restoration
Riffle and pool complex
Single and complete project
Stormwater management
Stormwater management facilities
Stream bed
Stream channelization
Tidal wetland
Vegetated buffer
Vegetated shallows
Waterbody

B. Nationwide Permits and Conditions

3. *Maintenance.* Activities related to: (i) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement, are permitted, provided the adverse environmental effects resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This nationwide permit authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire, or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(ii) Discharges of dredged or fill material, including excavation, into all waters of the United States to remove accumulated sediments and debris in the vicinity of, and within, existing structures (*e.g.*, bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional rip rap to protect the structure, provided the permittee notifies the District Engineer in accordance with General Condition 13. The removal of sediment is limited to the minimum necessary to restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. The placement of rip rap must be the minimum necessary to protect the structure or to ensure the safety of the structure. All excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the District Engineer under separate authorization. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the District Engineer.

(iii) Discharges of dredged or fill material, including excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event, including the construction, placement, or installation of upland protection structures and minor dredging to remove obstructions in waters of the United States. (Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a Section 404 permit provided the uplands are restored to their original pre-event location. This NWP is for the activities in waters of the United States associated with the replacement of the uplands.) The permittee must notify the District Engineer, in accordance with General Condition 13, within 12 months of the date of the damage and the work must commence, or be under contract to commence, within two years of the date of the damage. The permittee should provide evidence, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. The restoration of the damaged areas cannot exceed the contours, or ordinary high water mark, that existed prior to the damage. The District Engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this permit. Minor dredging to remove obstructions from the adjacent waterbody is limited to 50 cubic yards below the plane of the ordinary high water mark, and is limited to the amount necessary to restore the pre-existing bottom contours of the waterbody. The dredging may not be done primarily to obtain fill for any restoration activities. The discharge of dredged or fill material and all related work needed to restore the upland must be part of a single and complete project. This permit cannot be used in conjunction with NWP 18 or NWP 19 to restore damaged upland areas. This permit does not authorize the replacement of lands lost through gradual erosion processes.

Maintenance dredging for the primary purpose of navigation and beach restoration are not authorized by this permit. This permit does not authorize new stream channelization or stream relocation projects. Any work authorized by this permit must not cause more than minimal degradation of water quality, more than minimal changes to the flow characteristics of the stream, or increase flooding (See General Conditions 9 and 21). (Sections 10 and 404)

Note: This NWP authorizes the minimal impact repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Section 404(f) exemption for maintenance.

7. Outfall Structures and Maintenance. Activities related to: (i) construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or is otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act), and (ii) maintenance excavation, including dredging, to remove accumulated sediments blocking or restricting outfall and intake structures, accumulated sediments from small impoundments associated with outfall and intake structures, and accumulated sediments from canals associated with outfall and intake structures, provided the activity meets all of the following criteria:

a. The permittee notifies the District Engineer in accordance with General Condition 13;

b. The amount of excavated or dredged material must be the minimum necessary to restore the outfalls, intakes, small impoundments, and canals to original design capacities and design configurations (*i.e.,* depth and width);

c. The excavated or dredged material is deposited and retained at an upland site, unless otherwise approved by the District Engineer under separate authorization; and

d. Proper soil erosion and sediment control measures are used to minimize reentry of sediments into waters of the United States.

The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure. For maintenance excavation and dredging to remove accumulated sediments, the notification must include information regarding the original design capacities and configurations of the facility and the presence of special aquatic sites (*e.g.*, vegetated shallows) in the vicinity of the proposed work. (Sections 10 and 404)

12. *Utility Line Activities.* Activities required for the construction, maintenance, and repair of utility lines and associated facilities in waters of the United States as follows:

(i) *Utility lines:* The construction, maintenance, or repair of utility lines, including outfall and intake structures and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in preconstruction contours. A ''utility line'' is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication (see Note 1, below). Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary side casting not to exceed a total of 180 days, where appropriate. In wetlands, the top 6'' to 12'' of the trench should normally be backfilled with topsoil from the trench. Furthermore, the trench cannot be constructed in such a manner as to drain waters of the United States (*e.g.*, backfilling with extensive gravel layers, creating a french drain effect). For example, utility line trenches can be backfilled with clay blocks to ensure that the trench does not drain the waters of the United States through which the utility line is installed. Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

(ii) *Utility line substations:* The construction, maintenance, or expansion of a substation facility associated with a power line or utility line in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the activity does not result in the loss of greater than ½ acre of non-tidal waters of the United States.

(iii) *Foundations for overhead utility line towers, poles, and anchors:* The construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

(iv) *Access roads:* The construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than ½ acre of non-tidal waters of the United States. Access roads shall be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes the adverse effects on waters of the United States and as near as possible to preconstruction contours and elevations (*e.g.*, at grade corduroy roads or geotextile/gravel roads). Access roads constructed above preconstruction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

The term ''utility line'' does not include activities which drain a water of the United States, such as drainage tile or french drains; however, it does apply to pipes conveying drainage from another area. For the purposes of this NWP, the loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding, excavation, or drainage as a result of the project. Activities authorized by paragraphs (i) through (iv) may not exceed a total of ½ acre loss of waters of the United States. Waters of the United States temporarily affected by filling, flooding, excavation, or drainage, where the project area is restored to preconstruction contours and elevations, are not included in the calculation of permanent loss of waters of the United States. This includes temporary construction mats (*e.g.*, timber, steel, geotextile) used during construction and removed upon completion of the work. Where certain functions and values of waters of the United States are permanently adversely affected, such as the conversion of a forested wetland to a herbaceous wetland in the permanently maintained utility line right-of-way, mitigation will be required to reduce the adverse effects of the project to the minimal level.

Mechanized landclearing necessary for the construction, maintenance, or repair of utility lines and the construction, maintenance, and expansion of utility line substations, foundations for overhead utility lines, and access roads is authorized, provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained as near as possible. The area of waters of the United States that is filled, excavated, or flooded must be limited to the minimum necessary to construct the utility line, substations, foundations, and access roads. Excess material must be removed to upland areas immediately upon completion of construction. This NWP may authorize utility lines in or affecting navigable waters of the United States, even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322).

Notification: The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:

(a) Mechanized land clearing in a forested wetland for the utility line right-of-way;

(b) A Section 10 permit is required;

(c) The utility line in waters of the United States, excluding overhead lines, exceeds 500 feet;

(d) The utility line is placed within a jurisdictional area (*i.e.,* a water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area;

(e) Discharges associated with the construction of utility line substations that result in the loss of greater than 1/10 acre of waters of the United States;

(f) Permanent access roads constructed above grade in waters of the United States for a distance of more than 500 feet; or

(g) Permanent access roads constructed in waters of the United States with impervious materials. (Sections 10 and 404)

Note 1: Overhead utility lines constructed over Section 10 waters and utility lines that are routed in or under Section 10 waters without a discharge of dredged or fill material require a Section 10 permit; except for pipes or pipelines used to transport gaseous, liquid, liquefiable, or slurry substances over navigable waters of the United States, which are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material associated with such pipelines will require a Corps permit under Section 404.

Note 2: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work and the area restored to preconstruction contours, elevations, and wetland conditions. Temporary access roads for construction may be authorized by NWP 33.

Note 3: Where the proposed utility line is constructed or installed in navigable waters of the United States (*i.e.,* Section 10 waters), copies of the PCN and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the utility line to protect navigation.

14. *Linear Transportation Crossings.* Activities required for the construction, expansion, modification, or improvement of linear transportation crossings (*e.g.,* highways, railways, trails, and airport runways and taxiways) in waters of the United States, including wetlands, provided the activity meets the following criteria:

a. This NWP is subject to the following acreage and linear limits:

(1) For *public linear transportation projects* in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1/2 acre of waters of the United States;

(2) For *public linear transportation projects* in tidal waters or non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1/3 acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet, or;

(3) For *private linear transportation projects* in all waters of the United States, provided the discharge does not cause the loss of greater than 1/3 acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet;

b. The permittee must notify the District Engineer in accordance with General Condition 13 if any of the following criteria are met:

(1) The discharge causes the loss of greater than 1/10 acre of waters of the United States; or

(2) There is a discharge in a special aquatic site, including wetlands;

c. The notification must include a compensatory mitigation proposal to offset permanent losses of waters of the United States to ensure that those losses result only in minimal adverse effects to the aquatic environment and a statement describing how temporary losses of waters of the United States will be minimized to the maximum extent practicable;

d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of the affected special aquatic sites;

e. The width of the fill is limited to the minimum necessary for the crossing;

f. This permit does not authorize stream channelization, and the authorized activities must not cause more than minimal changes to the hydraulic flow characteristics of the stream, increase flooding, or cause more than minimal degradation of water quality of any stream (see General Conditions 9 and 21);

g. This permit cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars; and

h. The crossing is a single and complete project for crossing a water of the United States. Where a road segment (*i.e.,* the shortest segment of a road with independent utility that is part of a larger project) has multiple crossings of streams (several single and complete projects) the Corps will consider whether it should use its discretionary authority to require an individual permit. (Sections 10 and 404)

Note: Some discharges for the construction of farm roads, forest roads, or temporary roads for moving mining equipment may be eligible for an exemption from the need for a Section 404 permit (see 33 CFR 323.4).

27. *Stream and Wetland Restoration Activities.* Activities in waters of the United States associated with the restoration of former waters, the enhancement of degraded tidal and non-tidal wetlands and riparian areas, the creation of tidal and non-tidal wetlands and riparian areas, and the restoration and enhancement of non-tidal streams and non-tidal open water areas as follows:

(a) The activity is conducted on:

(1) Non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration, or creation agreement between the landowner and the U.S. Fish and Wildlife Service (FWS) or the Natural Resources Conservation Service (NRCS) or voluntary wetland restoration, enhancement, and creation actions documented by the NRCS pursuant to NRCS regulations; or

(2) Any Federal land; or

(3) Reclaimed surface coal mined lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining or the applicable state agency (the future reversion does not apply to streams or wetlands created, restored, or enhanced as mitigation for the mining impacts, nor naturally due to hydrologic or topographic features, nor for a mitigation bank); or

(4) Any private or public land;

(b) *Notification:* For activities on any private or public land that are not described by paragraphs (a)(1), (a)(2), or (a)(3) above, the permittee must notify the District Engineer in accordance with General Condition 13; and

(c) Only native plant species should be planted at the site, if permittee is vegetating the project site.

Activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or creation of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or create stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; activities needed to reestablish vegetation, including

plowing or discing for seed bed preparation; mechanized landclearing to remove undesirable vegetation; and other related activities.

This NWP does not authorize the conversion of a stream to another aquatic use, such as the creation of an impoundment for waterfowl habitat. This NWP does not authorize stream channelization. This NWP does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. However, this NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands, on the project site provided there are net gains in aquatic resource functions and values. For example, this NWP may authorize the creation of an open water impoundment in a non-tidal emergent wetland, provided the non-tidal emergent wetland is replaced by creating that wetland type on the project site. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Reversion. For enhancement, restoration, and creation projects conducted under paragraphs (a)(2) and (a)(4), this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion. For restoration, enhancement, and creation projects conducted under paragraphs (a)(1) and (a)(3), this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (*i.e.*, prior to the restoration, enhancement, or creation activities) within five years after expiration of a limited term wetland restoration or creation agreement or permit, even if the discharge occurs after this NWP expires. This NWP also authorizes the reversion of wetlands that were restored, enhanced, or created on prior-converted cropland that has not been abandoned, in accordance with a binding agreement between the landowner and NRCS or FWS (even though the restoration, enhancement, or creation activity did not require a Section 404 permit). The five-year reversion limit does not apply to agreements without time limits reached under paragraph (a)(1). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate State agency executing the agreement or permit. Prior to any reversion activity, the permittee or the appropriate Federal or State agency must notify the District Engineer and include the documentation of the prior condition. Once an area has reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. (Sections 10 and 404)

Note: Compensatory mitigation is not required for activities authorized by this NWP, provided the authorized work results in a net increase in aquatic resource functions and values in the project area. This NWP can be used to authorize compensatory mitigation projects, including mitigation banks, provided the permittee notifies the District Engineer in accordance with General Condition 13, and the project includes compensatory mitigation for impacts to waters of the United States caused by the authorized work. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition. NWP 27 can be used to authorize impacts at a mitigation bank, but only in circumstances where it has been approved under the Interagency Federal Mitigation Banks Guidelines.

39. Residential, Commercial, and Institutional Developments. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, commercial, and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development). The construction of new ski areas or oil and gas wells is not authorized by this NWP. Residential developments include multiple and single unit developments. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The activities listed above are authorized, provided the activities meet all of the following criteria:

a. The discharge does not cause the loss of greater than ½ acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;

c. The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:

(1) The discharge causes the loss of greater than ⅒ acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters; or

(2) The discharge causes the loss of any open waters, including perennial or intermittent streams, below the ordinary high water mark (see Note, below).

d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites;

e. The discharge is part of a single and complete project;

f. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification, when required, must include a written statement explaining how avoidance and minimization of losses of waters of the United States were achieved on the project site. Compensatory mitigation will normally be required to offset the losses of waters of the United States. (See General Condition 19.) The notification must also include a compensatory mitigation proposal for offsetting unavoidable losses of waters of the United States. If an applicant asserts that the adverse effects of the project are minimal without mitigation, then the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration;

g. When this NWP is used in conjunction with any other NWP, any combined total permanent loss of waters of the United States exceeding ⅒ acre requires that the permittee notify the District Engineer in accordance with General Condition 13;

h. Any work authorized by this NWP must not cause more than minimal degradation of water quality or more than minimal changes to the flow characteristics of any stream (see General Conditions 9 and 21);

i. For discharges causing the loss of ⅒ acre or less of waters of the United States, the permittee must submit a report, within 30 days of completion of the work, to the District Engineer that contains the following information: (1) The name, address, and telephone number of the permittee; (2) The location of the work; (3) A description of the work; (4) The type and acreage of

the loss of waters of the United States (*e.g.*, 1/12 acre of emergent wetlands); and (5) The type and acreage of any compensatory mitigation used to offset the loss of waters of the United States (e.g., 1/12 acre of emergent wetlands created on-site);

j. If there are any open waters or streams within the project area, the permittee will establish and maintain, to the maximum extent practicable, wetland or upland vegetated buffers next to those open waters or streams consistent with General Condition 19. Deed restrictions, conservation easements, protective covenants, or other means of land conservation and preservation are required to protect and maintain the vegetated buffers established on the project site; and

k. Stream channelization or stream relocation downstream of the point on the stream where the annual average flow is 1 cubic foot per second is not authorized by this NWP.

Only residential, commercial, and institutional activities with structures on the foundation(s) or building pad(s), as well as the attendant features, are authorized by this NWP. The compensatory mitigation proposal required in paragraph (f) of this NWP may be either conceptual or detailed. The wetland or upland vegetated buffer required in paragraph (j) of this NWP will normally be 25 to 50 feet wide on each side of the stream, but the District Engineer may require wider vegetated buffers to address documented water quality concerns. The required wetland or upland vegetated buffer is part of the overall compensatory mitigation requirement for this NWP. If the project site was previously used for agricultural purposes and the farm owner/operator used NWP 40 to authorize activities in waters of the United States to increase production or construct farm buildings, NWP 39 cannot be used by the developer to authorize additional activities in waters of the United States on the project site in excess of the acreage limit for NWP 39 (*i.e.*, the combined acreage loss authorized under NWPs 39 and 40 cannot exceed 1/2 acre).

Subdivisions: For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to paragraph (c) of this NWP is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed 1/10 acre. Any discharge in any real estate subdivision which would cause the aggregate total loss of waters of the United States in the subdivision to exceed 1/2 acre is not authorized by this NWP, unless the District Engineer exempts a particular subdivision or parcel by making a written determination that the individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to July 21, 1999, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate the property owner's investment-backed expectations. Once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 39. For the purposes of NWP 39, the term ''real estate subdivision'' shall be interpreted to include circumstances where a landowner or developer divides a tract of land into smaller parcels for the purpose of selling, conveying, transferring, leasing, or developing said parcels. This would include the entire area of a residential, commercial, or other real estate subdivision, including all parcels and parts thereof. (Sections 10 and 404)

Note: Areas where there is no wetland vegetation are determined by the presence or absence of an ordinary high water mark or bed and bank. Areas that are waters of the United States based on this criteria would require a PCN even though water is infrequently present in the stream channel (except for ephemeral waters).

40. *Agricultural Activities.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the purpose of improving agricultural production and the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized landclearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities, provided the permittee complies with the following terms and conditions:

a. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is a USDA program participant:

(1) The permittee must obtain a categorical minimal effects exemption, minimal effect exemption, or mitigation exemption from NRCS in accordance with the provisions of the Food Security Act of 1985, as amended (16 U.S.C. 3801 *et seq.*);

(2) The discharge into non-tidal wetlands does not result in the loss of greater than 1/2 acre of non-tidal wetlands on a farm tract;

(3) The permittee must have an NRCS-certified wetland delineation;

(4) The permittee must implement an NRCS-approved compensatory mitigation plan that fully offsets wetland losses, if required; and

(5) The permittee must submit a report, within 30 days of completion of the authorized work, to the District Engineer that contains the following information: (a) The name, address, and telephone number of the permittee; (b) The location of the work; (c) A description of the work; (d) The type and acreage (or square feet) of the loss of wetlands (e.g., 1/3 acre of emergent wetlands); and (e) The type, acreage (or square feet), and location of compensatory mitigation (*e.g.*, 1/3 acre of emergent wetlands on the farm tract); or

b. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is not a USDA program participant (or a USDA program participant for which the proposed work does not qualify for authorization under paragraph (a) of this NWP):

(1) The discharge into non-tidal wetlands does not result in the loss of greater than 1/2 acre of non-tidal wetlands on a farm tract;

(2) The permittee must notify the District Engineer in accordance with General Condition 13, if the discharge results in the loss of greater than 1/10 acre of non-tidal wetlands;

(3) The notification must include a delineation of affected wetlands; and

(4) The notification must include a compensatory mitigation proposal to offset losses of waters of the United States; or

c. For the construction of building pads for farm buildings, the discharge does not cause the loss of greater than 1/2 acre of non-tidal wetlands that were in agricultural production prior to December 23, 1985, (*i.e.*, farmed wetlands) and the permittee must notify the District Engineer in accordance with General Condition 13; or

d. Any activity in other waters of the United States is limited to the relocation of existing serviceable drainage ditches constructed in non-tidal streams. This NWP does not authorize the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in non-tidal streams; and

e. Activities located in 100-year floodplains identified by FEMA's Flood Insurance Rate Maps or FEMA-approved local floodplain maps must comply with General Condition 26.

The term ''farm tract'' refers to a parcel of land identified by the Farm Service Agency. The Corps will identify

other waters of the United States on the farm tract. NRCS will determine if a proposed agricultural activity meets the terms and conditions of paragraph (a) of this NWP, except as provided below. For those activities that require notification, the District Engineer will determine if a proposed agricultural activity is authorized by paragraphs (b), (c), and/or (d) of this NWP. USDA program participants requesting authorization for discharges of dredged or fill material into waters of the United States authorized by paragraphs (c) or (d) of this NWP, in addition to paragraph (a), must notify the District Engineer in accordance with General Condition 13 and the District Engineer will determine if the entire single and complete project is authorized by this NWP. Discharges of dredged or fill material into waters of the United States associated with completing required compensatory mitigation are authorized by this NWP. However, total impacts, including other authorized impacts under this NWP, may not exceed the ½ acre limit of this NWP. This NWP does not affect, or otherwise regulate, discharges associated with agricultural activities when the discharge qualifies for an exemption under Section 404(f) of the Clean Water Act, even though a categorical minimal effects exemption, minimal effect exemption, or mitigation exemption from NRCS pursuant to the Food Security Act of 1985, as amended, may be required. Activities authorized by paragraphs (a) through (d) may not exceed a total of ½ acre on a single farm tract. Activities authorized by paragraphs (c) and (d) are not included in the ½ acre limit for the farm tract. If the site was used for agricultural purposes and the farm owner/operator used either paragraphs (a), (b), or (c) of this NWP to authorize activities in waters of the United States to increase agricultural production or construct farm buildings, and the current landowner wants to use NWP 39 to authorize residential, commercial, or industrial development activities in waters of the United States on the site, the combined acreage loss authorized by NWPs 39 and 40 cannot exceed ½ acre. (Section 404)

41. *Reshaping Existing Drainage Ditches.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in these waters. The reshaping of the ditch cannot increase drainage capacity beyond the original design capacity or expand the area drained by the ditch as originally designed (*i.e.*, the capacity of the ditch must be the same as originally designed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality (*e.g.*, by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, increase uptake of nutrients and other substances by vegetation, etc.). The permittee must notify the District Engineer in accordance with General Condition 13, if greater than 500 linear feet of drainage ditch will be reshaped. Material resulting from excavation may not be permanently sidecast into waters but may be temporarily sidecast (up to three months) into waters of the United States, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary sidecasting not to exceed a total of 180 days, where appropriate. This NWP does not apply to reshaping drainage ditches constructed in uplands, since these areas are not waters of the United States, and thus no permit from the Corps is required, or to the maintenance of existing drainage ditches to their original dimensions and configuration, which does not require a Section 404 permit (see 33 CFR 323.4(a)(3)). This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects. (Section 404)

42. *Recreational Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of recreational facilities, provided the activity meets all of the following criteria:

a. The discharge does not cause the loss of greater than ½ acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;

c. For discharges causing the loss of greater than 1/10 acre of non-tidal waters of the United States, the permittee notifies the District Engineer in accordance with General Condition 13;

d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites;

e. The discharge is part of a single and complete project; and

f. Compensatory mitigation will normally be required to offset the losses of waters of the United States. The notification must also include a compensatory mitigation proposal which provides for 1:1 replacement to offset authorized losses of waters of the United States.

For the purposes of this NWP, the term ''recreational facility'' is defined as a recreational activity that is integrated into the natural landscape and does not substantially change preconstruction grades or deviate from natural landscape contours. For the purpose of this permit, the primary function of recreational facilities does not include the use of motor vehicles, buildings, or impervious surfaces. Examples of recreational facilities that may be authorized by this NWP include: hiking trails, bike paths, horse paths, nature centers, and campgrounds (excluding trailer parks). The construction or expansion of golf courses and the expansion of ski areas may be authorized by this NWP, provided the golf course or ski area does not substantially deviate from natural landscape contours and is designed to minimize adverse effects to waters of the United States and riparian areas through the use of such practices as integrated pest management, adequate stormwater management facilities, vegetated buffers, reduced fertilizer use, etc. The facility must have an adequate water quality management plan in accordance with General Condition 9, such as a stormwater management facility, to ensure that the recreational facility results in no substantial adverse effects to water quality. This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables, that are directly related to the recreational activity. This NWP does not authorize other buildings, such as hotels, restaurants, etc. The construction or expansion of playing fields (*e.g.*, baseball, soccer, or football fields), basketball and tennis courts, racetracks, stadiums, arenas, and the construction of new ski areas are not authorized by this NWP. (Section 404)

43. *Stormwater Management Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction and maintenance of stormwater management facilities, including activities for the excavation of

stormwater ponds/facilities, detention basins, and retention basins; the installation and maintenance of water control structures, outfall structures and emergency spillways; and the maintenance dredging of existing stormwater management ponds/facilities and detention and retention basins, provided the activity meets all of the following criteria:

a. The discharge for the construction of new stormwater management facilities does not cause the loss of greater than ½ acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;

c. The discharge of dredged or fill material for the construction of new stormwater management facilities in perennial streams is not authorized;

d. For discharges or excavation for the construction of new stormwater management facilities or for the maintenance of existing stormwater management facilities causing the loss of greater than 1/10 acre of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, the permittee notifies the District Engineer in accordance with General Condition 13. In addition, the notification must include:

(1) A maintenance plan. The maintenance plan should be in accordance with State and local requirements, if any such requirements exist;

(2) For discharges in special aquatic sites, including wetlands and submerged aquatic vegetation, the notification must include a delineation of affected areas; and

(3) A compensatory mitigation proposal that offsets the loss of waters of the United States. Maintenance in constructed areas will not require mitigation provided such maintenance is accomplished in designated maintenance areas and not within compensatory mitigation areas (*i.e.*, district engineers may designate non-maintenance areas, normally at the downstream end of the stormwater management facility, in existing stormwater management facilities). (No mitigation will be required for activities which are exempt from Section 404 permit requirements);

e. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification must include a written statement to the District Engineer detailing compliance with this condition (*i.e.*, why the discharge must occur in waters of the United States and why additional minimization cannot be achieved);

f. The stormwater management facility must comply with General Condition 21 and be designed using best management practices (BMPs) and watershed protection techniques. Examples may include forebays (deeper areas at the upstream end of the stormwater management facility that would be maintained through excavation), vegetated buffers, and siting considerations to minimize adverse effects to aquatic resources. Another example of a BMP would be bioengineering methods incorporated into the facility design to benefit water quality and minimize adverse effects to aquatic resources from storm flows, especially downstream of the facility, that provide, to the maximum extent practicable, for long term aquatic resource protection and enhancement;

g. Maintenance excavation will be in accordance with an approved maintenance plan and will not exceed the original contours of the facility as approved and constructed; and

h. The discharge is part of a single and complete project. (Section 404)

44. *Mining Activities.* Discharges of dredged or fill material into: (i) Isolated waters, streams where the annual average flow is 1 cubic foot per second or less, and non-tidal wetlands adjacent to headwater streams, for aggregate mining (*i.e.*, sand, gravel, and crushed and broken stone) and associated support activities; (ii) lower perennial streams, excluding wetlands adjacent to lower perennial streams, for aggregate mining activities (support activities in lower perennial streams or adjacent wetlands are not authorized by this NWP); and/or (iii) isolated waters and non-tidal wetlands adjacent to headwater streams, for hard rock/mineral mining activities (*i.e.*, extraction of metalliferous ores from subsurface locations) and associated support activities, provided the discharge meets the following criteria:

a. The mined area within waters of the United States, plus the acreage loss of waters of the United States resulting from support activities, cannot exceed ½ acre;

b. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification must include a written statement detailing compliance with this condition (*i.e.*, why the discharge must occur in waters of the United States and why additional minimization cannot be achieved);

c. In addition to General Conditions 17 and 20, activities authorized by this permit must not substantially alter the sediment characteristics of areas of concentrated shellfish beds or fish spawning areas. Normally, the mandated water quality management plan should address these impacts;

d. The permittee must implement necessary measures to prevent increases in stream gradient and water velocities and to prevent adverse effects (*e.g.*, head cutting, bank erosion) to upstream and downstream channel conditions;

e. Activities authorized by this permit must not result in adverse effects on the course, capacity, or condition of navigable waters of the United States;

f. The permittee must utilize measures to minimize downstream turbidity;

g. Wetland impacts must be compensated through mitigation approved by the Corps;

h. Beneficiation and mineral processing for hard rock/mineral mining activities may not occur within 200 feet of the ordinary high water mark of any open waterbody. Although the Corps does not regulate discharges from these activities, a Clean Water Act Section 402 permit may be required;

i. All activities authorized by this NWP must comply with General Conditions 9 and 21. Further, the District Engineer may require modifications to the required water quality management plan to ensure that the authorized work results in minimal adverse effects to water quality;

j. Except for aggregate mining activities in lower perennial streams, no aggregate mining can occur within stream beds where the average annual flow is greater than 1 cubic foot per second or in waters of the United States within 100 feet of the ordinary high water mark of headwater stream segments where the average annual flow of the stream is greater than 1 cubic foot per second (aggregate mining can occur in areas immediately adjacent to the ordinary high water mark of a stream where the average annual flow is 1 cubic foot per second or less);

k. *Single and complete project:* The discharge must be for a single and complete project, including support activities. Discharges of dredged or fill material into waters of the United States for multiple mining activities on several designated parcels of a single and complete mining operation can be authorized by this NWP provided the ½ acre limit is not exceeded; and

l. *Notification:* The permittee must notify the District Engineer in accordance with General Condition 13. The notification must include: (1) A description of waters of the United

States adversely affected by the project; (2) A written statement to the District Engineer detailing compliance with paragraph (b), above (i.e., why the discharge must occur in waters of the United States and why additional minimization cannot be achieved); (3) A description of measures taken to ensure that the proposed work complies with paragraphs (c) through (f), above; and (4) A reclamation plan (for aggregate mining in isolated waters and non-tidal wetlands adjacent to headwaters and hard rock/mineral mining only).

This NWP does not authorize hard rock/mineral mining, including placer mining, in streams. No hard rock/mineral mining can occur in waters of the United States within 100 feet of the ordinary high water mark of headwater streams. The terms ''headwaters'' and ''isolated waters'' are defined at 33 CFR 330.2(d) and (e), respectively. For the purposes of this NWP, the term ''lower perennial stream'' is defined as follows: ''A stream in which the gradient is low and water velocity is slow, there is no tidal influence, some water flows throughout the year, and the substrate consists mainly of sand and mud.'' (Sections 10 and 404)

C. Nationwide Permit General Conditions

The following general conditions must be followed in order for any authorization by an NWP to be valid:

1. Navigation. No activity may cause more than a minimal adverse effect on navigation.

2. Proper Maintenance. Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

3. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date.

4. Aquatic Life Movements. No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.

5. Equipment. Heavy equipment working in wetlands must be placed on mats, or other measures must be taken to minimize soil disturbance.

6. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions which may have been added by the division engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the State or tribe in its Section 401 water quality certification and Coastal Zone Management Act consistency determination.

7. Wild and Scenic Rivers. No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system, while the river is in an official study status; unless the appropriate Federal agency, with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation, or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (*e.g.,* National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

8. Tribal Rights. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

9. Water Quality. (a) In certain States and tribal lands an individual 401 water quality certification must be obtained or waived (See 33 CFR 330.4(c)).

(b) For NWPs 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44, where the State or tribal 401 certification (either generically or individually) does not require or approve a water quality management plan, the permittee must include design criteria and techniques that will ensure that the authorized work does not result in more than minimal degradation of water quality. An important component of a water quality management plan includes stormwater management that minimizes degradation of the downstream aquatic system, including water quality. Refer to General Condition 21 for stormwater management requirements. Another important component of a water quality management plan is the establishment and maintenance of vegetated buffers next to open waters, including streams. Refer to General Condition 19 for vegetated buffer requirements for the NWPs.

10. Coastal Zone Management. In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (see Section 330.4(d)).

11. Endangered Species. (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which will destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in the designated critical habitat and shall not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. For activities that may affect Federally-listed endangered or threatened species or designated critical habitat, the notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. As a result of formal or informal consultation with the FWS or NMFS, the District Engineer may add species-specific regional endangered species conditions to the NWPs.

(b) Authorization of an activity by a nationwide permit does not authorize the ''take'' of a threatened or endangered species as defined under the Federal Endangered Species Act. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with ''incidental take'' provisions, etc.) from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, both lethal and non-lethal ''takes'' of protected species are in violation of the Endangered Species Act. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. Fish and Wildlife Service and National Marine Fisheries Service or their world wide web pages at http://www.fws.gov/r9endspp/endspp.html and http://www.nfms.gov/prot__res/esahome.html, respectively.

12. Historic Properties. No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR part 325, Appendix C. The prospective permittee must notify the District Engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not

begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)). For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the notification must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

13. Notification. (a) Timing: Where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction notification (PCN) as early as possible. The District Engineer must determine if the PCN is complete within 30 days of the date of receipt and can request the additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the District Engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the District Engineer. The prospective permittee shall not begin the activity:

(1) Until notified in writing by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the District or Division Engineer; or

(2) If notified in writing by the District or Division Engineer that an individual permit is required; or

(3) Unless 45 days have passed from the District Engineer's receipt of the complete notification and the prospective permittee has not received written notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) Contents of Notification: The notification must be in writing and include the following information:

(1) Name, address, and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity; and

(4) For NWPs 7, 12, 14, 18, 21, 34, 38, 39, 40, 41, 42, and 43, the PCN must also include a delineation of affected special aquatic sites, including wetlands, vegetated shallows (*e.g.,* submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));

(5) For NWP 7, Outfall Structures and Maintenance, the PCN must include information regarding the original design capacities and configurations of those areas of the facility where maintenance dredging or excavation is proposed.

(6) For NWP 14, Linear Transportation Crossings, the PCN must include a compensatory mitigation proposal to offset permanent losses of waters of the United States and a statement describing how temporary losses of waters of the United States will be minimized to the maximum extent practicable.

(7) For NWP 21, Surface Coal Mining Activities, the PCN must include an Office of Surface Mining (OSM) or state-approved mitigation plan.

(8) For NWP 27, Stream and Wetland Restoration, the PCN must include documentation of the prior condition of the site that will be reverted by the permittee.

(9) For NWP 29, Single-Family Housing, the PCN must also include:

(i) Any past use of this NWP by the individual permittee and/or the permittee's spouse;

(ii) A statement that the single-family housing activity is for a personal residence of the permittee;

(iii) A description of the entire parcel, including its size, and a delineation of wetlands. For the purpose of this NWP, parcels of land measuring ¼ acre or less will not require a formal on-site delineation. However, the applicant shall provide an indication of where the wetlands are and the amount of wetlands that exists on the property. For parcels greater than ¼ acre in size, a formal wetland delineation must be prepared in accordance with the current method required by the Corps. (See paragraph 13(f));

(iv) A written description of all land (including, if available, legal descriptions) owned by the prospective permittee and/or the prospective permittee's spouse, within a one mile radius of the parcel, in any form of ownership (including any land owned as a partner, corporation, joint tenant, co-tenant, or as a tenant-by-the-entirety) and any land on which a purchase and sale agreement or other contract for sale or purchase has been executed;

(10) For NWP 31, Maintenance of Existing Flood Control Projects, the prospective permittee must either notify the District Engineer with a PCN prior to each maintenance activity or submit a five year (or less) maintenance plan. In addition, the PCN must include all of the following:

(i) Sufficient baseline information so as to identify the approved channel depths and configurations and existing facilities. Minor deviations are authorized, provided the approved flood control protection or drainage is not increased;

(ii) A delineation of any affected special aquatic sites, including wetlands; and,

(iii) Location of the dredged material disposal site.

(11) For NWP 33, Temporary Construction, Access, and Dewatering, the PCN must also include a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources.

(12) For NWPs 39, 43, and 44, the PCN must also include a written statement to the District Engineer explaining how avoidance and minimization of losses of waters of the United States were achieved on the project site.

(13) For NWP 39, Residential, Commercial, and Institutional Developments, and NWP 42, Recreational Facilities, the PCN must include a compensatory mitigation proposal that offsets unavoidable losses of waters of the United States or justification explaining why compensatory mitigation should not be required.

(14) For NWP 40, Agricultural Activities, the PCN must include a compensatory mitigation proposal to offset losses of waters of the United States.

(15) For NWP 43, Stormwater Management Facilities, the PCN must include, for the construction of new stormwater management facilities, a maintenance plan (in accordance with State and local requirements, if applicable) and a compensatory mitigation proposal to offset losses of waters of the United States.

(16) For NWP 44, Mining Activities, the PCN must include a description of all waters of the United States adversely affected by the project, a description of measures taken to minimize adverse effects to waters of the United States, a description of measures taken to comply with the criteria of the NWP, and a reclamation plan (for aggregate mining activities in isolated waters and non-

tidal wetlands adjacent to headwaters and any hard rock/mineral mining activities).

(17) For activities that may adversely affect Federally-listed endangered or threatened species, the PCN must include the name(s) of those endangered or threatened species that may be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work.

(18) For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

(19) For NWPs 12, 14, 29, 39, 40, 42, 43, and 44, where the proposed work involves discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within 100-year floodplains (as identified on FEMA's Flood Insurance Rate Maps or FEMA-approved local floodplain maps), the notification must include documentation demonstrating that the proposed work complies with the appropriate FEMA or FEMA-approved local floodplain construction requirements.

(c) Form of Notification: The standard individual permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PCN and must include all of the information required in (b) (1)–(19) of General Condition 13. A letter containing the requisite information may also be used.

(d) District Engineer's Decision: In reviewing the PCN for the proposed activity, the District Engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may, optionally, submit a proposed mitigation plan with the PCN to expedite the process and the District Engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, the District Engineer will notify the permittee and include any conditions the District Engineer deems necessary.

Any compensatory mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the District Engineer will expeditiously review the proposed compensatory mitigation plan. The District Engineer must review the plan within 45 days of receiving a complete PCN and determine whether the conceptual or specific proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant stating that the project can proceed under the terms and conditions of the nationwide permit.

If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the District Engineer determines that mitigation is required in order to ensure no more than minimal adverse effects on the aquatic environment, the activity will be authorized within the 45-day PCN period, including the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level. When conceptual mitigation is included, or a mitigation plan is required under item (2) above, no work in waters of the United States will occur until the District Engineer has approved a specific mitigation plan.

(e) Agency Coordination: The District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse effects on the aquatic environment to a minimal level.

For activities requiring notification to the District Engineer that result in the loss of greater than ½ acre of waters of the United States, the District Engineer will, upon receipt of a notification, provide immediately (*e.g.*, via facsimile transmission, overnight mail, or other expeditious manner), a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the District Engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 15 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. As required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act, the District Engineer will provide a response to National Marine Fisheries Service within 30 days of receipt of any Essential Fish Habitat conservation recommendations. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(f) Wetlands Delineations: Wetland delineations must be prepared in accordance with the current method required by the Corps. For NWP 29 see paragraph (b)(9)(iii) for parcels less than ¼ acre in size. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 45-day period will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

14. Compliance Certification. Every permittee who has received a Nationwide permit verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter. The certification will include: (a) A statement that the authorized work was done in

accordance with the Corps authorization, including any general or specific conditions; (b) A statement that any required mitigation was completed in accordance with the permit conditions; and (c) The signature of the permittee certifying the completion of the work and mitigation.

15. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed ⅓ acre.

16. Water Supply Intakes. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may occur in the proximity of a public water supply intake except where the activity is for repair of the public water supply intake structures or adjacent bank stabilization.

17. Shellfish Beds. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

18. Suitable Material. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.) and material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

19. Mitigation. The project must be designed and constructed to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable at the project site (i.e., on site). Mitigation will be required when necessary to ensure that the adverse effects to the aquatic environment are minimal. The District Engineer will consider the factors discussed below when determining the acceptability of appropriate and practicable mitigation necessary to offset adverse effects on the aquatic environment that are more than minimal.

(a) Compensatory mitigation at a minimum 1:1 ratio will be required for all wetland impacts requiring a PCN. Consistent with National policy, the District Engineer will establish a preference for restoration of wetlands to meet the minimum compensatory mitigation ratio, with preservation used only in exceptional circumstances.

(b) To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes. Examples of mitigation that may be appropriate and practicable include, but are not limited to: reducing the size of the project; establishing and maintaining wetland or upland vegetated buffers to protect open waters such as streams; and replacing losses of aquatic resource functions and values by creating, restoring, enhancing, or preserving similar functions and values, preferably in the same watershed;

(c) The District Engineer will require restoration, creation, enhancement, or preservation of other aquatic resources in order to offset the authorized impacts to the extent necessary to ensure that the adverse effects on the aquatic environment are minimal. An important element of any compensatory mitigation plan for projects in or near streams or other open waters is the establishment and maintenance, to the maximum extent practicable, of vegetated buffers next to open waters on the project site. The vegetated buffer should consist of native species. The District Engineer will determine the appropriate width of the vegetated buffer and in which cases it will be required. Normally, the vegetated buffer will be 25 to 50 feet wide on each side of the stream, but the District Engineer may require wider vegetated buffers to address documented water quality concerns. If there are open waters on the project site and the District Engineer requires compensatory mitigation for wetland impacts to ensure that the net adverse effects on the aquatic environment are minimal, any vegetated buffer will comprise no more than ⅓ of the remaining compensatory mitigation acreage after the permanently filled wetlands have been replaced on a one-to-one acreage basis. In addition, compensatory mitigation must address adverse effects on wetland functions and values and cannot be used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the NWPs (*e.g.*, for NWP 39, ¼ acre of wetlands cannot be created to change a ½ acre loss of wetlands to a ¼ acre loss; however, ½ acre of created wetlands can be used to reduce the impacts of a ⅓ acre loss of wetlands). If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed.

(d) To the extent appropriate, permittees should consider mitigation banking and other appropriate forms of compensatory mitigation. If the District Engineer determines that compensatory mitigation is necessary to offset losses of waters of the United States and ensure that the net adverse effects of the authorized work on the aquatic environment are minimal, consolidated mitigation approaches, such as mitigation banks, will be the preferred method of providing compensatory mitigation, unless the District Engineer determines that activity-specific compensatory mitigation is more appropriate, based on which is best for the aquatic environment. These types of mitigation are preferred because they involve larger blocks of protected aquatic environment, are more likely to meet the mitigation goals, and are more easily checked for compliance. If a mitigation bank or other consolidated mitigation approach is not available in the watershed, the District Engineer will consider other appropriate forms of compensatory mitigation to offset the losses of waters of the United States to ensure that the net adverse effects of the authorized work on the aquatic environment are minimal.

20. Spawning Areas. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (*e.g.*, excavate, fill, or smother downstream by substantial turbidity) of an important spawning area are not authorized.

21. Management of Water Flows. To the maximum extent practicable, the activity must be designed to maintain preconstruction downstream flow conditions (*e.g.*, location, capacity, and flow rates). Furthermore, the activity must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The activity must, to the maximum extent practicable, provide for retaining excess flows from the site, provide for maintaining surface flow rates from the site similar to preconstruction conditions, and must not increase water flows from the project site, relocate water, or redirect water flow beyond preconstruction conditions. In addition, the activity

must, to the maximum extent practicable, reduce adverse effects such as flooding or erosion downstream and upstream of the project site, unless the activity is part of a larger system designed to manage water flows.

22. Adverse Effects From Impoundments. If the activity, including structures and work in navigable waters of the United States or discharge of dredged or fill material, creates an impoundment of water, adverse effects on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.

23. Waterfowl Breeding Areas. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

24. Removal of Temporary Fills. Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

25. Designated Critical Resource Waters. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened and endangered species, coral reefs, State natural heritage sites, and outstanding national resource waters or other waters officially designated by a State as having particular environmental or ecological significance and identified by the District Engineer after notice and opportunity for public comment. The District Engineer may also designate additional critical resource waters after notice and opportunity for comment.

(a) Except as noted below, discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. Discharges of dredged or fill materials into waters of the United States may be authorized by the above NWPs in National Wild and Scenic Rivers if the activity complies with General Condition 7. Further, such discharges may be authorized in designated critical habitat for Federally listed threatened or endangered species if the activity complies with General Condition 11 and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service has concurred in a determination of compliance with this condition.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with General Condition 13, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The District Engineer may authorize activities under these NWPs only after he determines that the impacts to the critical resource waters will be no more than minimal.

26. *Fills Within 100-Year Floodplains.* For purposes of this general condition, 100-year floodplains will be identified through the Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps or FEMA-approved local floodplain maps.

(a) *Discharges Below Headwaters.* Discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within the 100-year floodplain at or below the point on a stream where the average annual flow is five cubic feet per second (*i.e.*, below headwaters) are not authorized by NWPs 29, 39, 40, 42, 43, and 44. For NWPs 12 and 14, the prospective permittee must notify the District Engineer in accordance with General Condition 13 and the notification must include documentation that any permanent, above-grade fills in waters of the United States within the 100-year floodplain below headwaters comply with FEMA or FEMA-approved local floodplain construction requirements.

(b) *Discharges in Headwaters* (*i.e.*, above the point on a stream where the average annual flow is five cubic feet per second).

(1) *Flood Fringe.* Discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within the flood fringe of the 100-year floodplain of headwaters are not authorized by NWPs 12, 14, 29, 39, 40, 42, 43, and 44, unless the prospective permittee notifies the District Engineer in accordance with General Condition 13. The notification must include documentation that such discharges comply with FEMA or FEMA-approved local floodplain construction requirements.

(2) *Floodway.* Discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within the floodway of the 100-year floodplain of headwaters are not authorized by NWPs 29, 39, 40, 42, 43, and 44. For NWPs 12 and 14, the permittee must notify the District Engineer in accordance with General Condition 13 and the notification must include documentation that any permanent, above grade fills proposed in the floodway comply with FEMA or FEMA-approved local floodplain construction requirements.

D. Further Information

1. District engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other Federal, State, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project.

E. Definitions

Best management practices: Best Management Practices (BMPs) are policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural. A BMP policy may affect the limits on a development.

Compensatory mitigation: For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Creation: The establishment of a wetland or other aquatic resource where one did not formerly exist.

Enhancement: Activities conducted in existing wetlands or other aquatic resources which increase one or more aquatic functions.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Farm tract: A unit of contiguous land under one ownership which is operated as a farm or part of a farm.

Flood Fringe: That portion of the 100-year floodplain outside of the floodway (often referred to as ''floodway fringe.''

Floodway: The area regulated by Federal, state, or local requirements to provide for the discharge of the base flood so the cumulative increase in water surface elevation is no more than

a designated amount (not to exceed one foot as set by the National Flood Insurance Program) within the 100-year floodplain.

Independent utility: A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases are not built can be considered as separate single and complete projects with independent utility.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that include the filled area and other waters that are permanently adversely affected by flooding, excavation, or drainage as a result of the regulated activity. Permanent adverse effects include permanent above-grade, at-grade, or below-grade fills that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is the threshold measurement of the impact to existing waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and values. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to preconstruction contours and elevations after construction, are not included in the measurement of loss of waters of the United States.

Non-tidal wetland: A non-tidal wetland is a wetland (*i.e.,* a water of the United States) that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (*i.e.,* the spring high tide line).

Open water: An area that, during a year with normal patterns of precipitation, has standing or flowing water for sufficient duration to establish an ordinary high water mark. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. The term ''open water'' includes rivers, streams, lakes, and ponds. For the purposes of the NWPs, this term does not include ephemeral waters.

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Permanent above-grade fill: A discharge of dredged or fill material into waters of the United States, including wetlands, that results in a substantial increase in ground elevation and permanently converts part or all of the waterbody to dry land. Structural fills authorized by NWPs 3, 25, 36, etc. are not included.

Preservation: The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the overall aquatic ecosystem.

Restoration: Re-establishment of wetland and/or other aquatic resource characteristics and function(s) at a site where they have ceased to exist, or exist in a substantially degraded state.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Steep gradient sections of streams are sometimes characterized by riffle and pool complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. Pools are characterized by a slower stream velocity, a streaming flow, a smooth surface, and a finer substrate.

Single and complete project: The term ''single and complete project'' is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers (see definition of independent utility). For linear projects, the ''single and complete project'' (*i.e.,* a single and complete crossing) will apply to each crossing of a separate water of the United States (*i.e.,* a single waterbody) at that location. An exception is for linear projects crossing a single waterbody several times at separate and distant locations: each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and BMPs, which retain water for a period of time to control runoff and/or improve the quality (*i.e.,* by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream channel to increase the rate of water flow through the stream channel. Manipulation may include deepening, widening, straightening, armoring, or other activities that change the stream cross-section or other aspects of stream channel geometry to increase the rate of water flow through the stream channel. A channelized stream remains a water of the United States, despite the modifications to increase the rate of water flow.

Tidal wetland: A tidal wetland is a wetland (*i.e.,* a water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line (*i.e.,* spring high tide line) and are inundated by tidal waters two times per lunar month, during spring high tides.

Vegetated buffer: A vegetated upland or wetland area next to rivers, streams, lakes, or other open waters which separates the open water from developed areas, including agricultural land. Vegetated buffers provide a variety of aquatic habitat functions and values (*e.g.,* aquatic habitat for fish and other aquatic organisms, moderation of water temperature changes, and detritus for aquatic food webs) and help improve or maintain local water quality. A vegetated buffer can be established by maintaining an existing vegetated area or planting native trees, shrubs, and herbaceous plants on land next to open waters. Mowed lawns are not considered vegetated buffers because they provide little or no aquatic habitat functions and values. The establishment and maintenance of vegetated buffers is a method of compensatory mitigation that can be used in conjunction with the restoration, creation, enhancement, or preservation of aquatic habitats to ensure that activities authorized by NWPs result in minimal adverse effects to the aquatic environment. (See General Condition 19.)

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: A waterbody is any area that in a normal year has water flowing or standing above ground to the extent that evidence of an ordinary high water mark is established. Wetlands contiguous to the waterbody are considered part of the waterbody.

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Appendix B - NEPA Implementation

Procedures for the Regulatory Program

1. **Introduction.** In keeping with the Executive Order 12291 and 40 CFR 1500.2, where interpretive problems arise in implementing this regulation, and consideration of all other factors do not give a clear indication of a reasonable interpretation, the interpretation (consistent with the spirit and intent of NEPA) which results in the least paperwork and delay will be used. Specific examples of ways to reduce paperwork in the NEPA process are found at 40 CFR 1500.4. Maximum advantage of these recommendations should be taken.
2. **General.** This appendix sets forth the implementing procedures for the Corps regulatory program. For

additional guidance see the Corps NEPA regulation 33 CFR Part 230 and for general policy guidance, see the CEQ regulations 40 CFR 1500-1508.

3. **Development of Information and Data.** See 40 CFR 1506.5. The district engineer may require the applicant to furnish appropriate information that the district engineer considers necessary for the preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS). See also 40 CFR 1502.22 regarding incomplete or unavailable information.
4. **Elimination of Duplication with State and Local Procedures.** See 40 CFR 1506.2.
5. **Public Involvement.** Several paragraphs of this appendix (paragraphs 7, 8, 11, 13 and 19) provide information on the requirements for district engineers to make available to the public certain environmental documents in accordance with 40 CFR 1506.6.
6. **Categorical Exclusions**
   . **General.** Even though EA or EIS is not legally mandated for any Federal action falling within one of the "categorical exclusions" that fact does not exempt any Federal action from procedural or substantive compliance with any other Federal law. For example, the Endangered Species Act, the Clean Water Act etc., is always mandatory, even for actions not requiring an EA or EIS. The following activities are not considered to be major Federal actions significantly affecting the quality of the human environment and are therefore categorically excluded from NEPA documentation:
      1. Fixed or floating small private piers, small docks, boat hoists and boathouses.
      2. Minority utility distribution and collection lines including irrigation;
      3. Minor maintenance dredging using existing disposal sites;
      4. Boat launching ramps;
      5. All applications which qualify as letters of permission (as described at 33 CFR 325.5(b)(2)).

   b. **Extraordinary Circumstances.** District engineers should be alert for extraordinary circumstances where normally excluded actions could have substantial environmental effects and thus require an EA or EIS. For a period of one year from the effective data of these regulations, district engineers should maintain an information list on the type and number of categorical exclusion actions which, due to extraordinary circumstances, triggered the need for an EA/FONSI or EIS. If the district engineer determines that a categorical exclusion should be modified, the information will be furnished to the division engineer who will review and analyze the actions and circumstances to determine if there is a basis for recommending a modification to the list of categorical exclusions. HQUSACE (CECW-OR) will review recommended changes for Corps-wide consistency and revise the list accordingly.
7. **EA/FONSI Document.** (See 40 CFR 1508.9 and 1508.13 for definitions)
   . **Environmental Assessment (EA) and Findings of No Significant Impact (FONSI).** The EA should normally be combined with other required documents (EA/404(b)(1)/ SOF/FONSI). "EA" as used throughout this Appendix normally refers to this combined document. The district engineer should complete an EA as soon as practicable after all relevant information is available (i.e. after the comment period for the public notice of the permit application has expired) and when the EA is a separate document it must be completed prior to the completion of the statement of finding (SOF). When the EA confirms that the impact of the applicant's proposal is not significant and there are no "unresolved conflicts concerning alternative uses of available resources" (section 102(2)(E) of NEPA), and the proposed activity is a water dependent" activity as defined in 40 CFR 230.10(a)(3), the EA need not include a discussion on alternatives. In all other cases where the district engineer determines that there are unresolved conflicts concerning alternatives uses of available resources, the EA shall include a discussion of the reasonable alternatives which are to be considered by the ultimate decision-maker. The decision options available to the Corps, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications or deny the permit. Modifications are limited to those project modifications within the scope of established permit conditioning policy (See 33 CFR 325.4). The decision option to deny the permit results in the "no action" alternative (i.e. no activity requiring a Corps

permit). The combined document should not exceed 15 pages and shall conclude with a FONSI (See 40 CFR 1508.13) or a determination hat an EIS is required. The district engineer may delegate the signing of the NEPA document. Should the EA demonstrate that an EIS is necessary, the district engineer shall follow the procedures outlined in paragraph 8 of this Appendix. In those cases where it is obvious an EIS is required, an EA is not required. However, the district engineer should document his reasons for requiring an EIS.

b. Scope of Analysis.

1. In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a large project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring the DA permit and those portions of the enitre project over which the district engineer has sufficient control and responsibility to warrant Federal review.

2. The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a federal action. Theses are cases where the environmental consequences are essentially products of the Corps permit action. Typical factors to be considered in determining whether sufficient "control and responsibility" exists include:

i. Whether or not the regulated activity compromises "merely a link" in a corridor type project (e.g. a transportation or utility transmission project).

ii. Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.

iii. The extent to which the entire project will be within Corps jurisdiction.

iv. The extent of cumulative control and responsibility.

. Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project. There are cases where the environmental consequences of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation, or approval(not including funding assistance solely in the form of general revenue sharing funds, with no Federal agency control over the subsequent use of such funds, and not including judicial or administrative civil or criminal enforcement action).

B. In determining whether sufficient cumulative involvement exists to expand the scope of Federal action the district engineer should consider whether other Federal agencies are required to take Federal action under the Fish and Wildlife Coordination Act (16 U.S.C. 661 et. seq.), the National Historic Preservation Act of 1966 (U.S.C. 470 et seq.), The Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), Executive Order 11990, Protection of Wetlands, (42 U.S.C. 4321 91977), and other environmental review laws and executive orders.

C. The district engineer should also refer to paragraphs 8(b) and 8(c) of this appendix for guidance on determining whether it should be the lead or cooperating agency in these situations. These factors will be added to or modified through guidance as additional field experience develops.

3. Examples. If a non-Federal oil refinery, electric generating plant, or industrial facility is proposed to be built on an upland site and the only DA permit requirement relates to a connecting pipeline, supply loading terminal or fill road permit, in and of itself, normally would not constitute

sufficient overall Federal involvement with the project to justify expanding the scope of a Corps NEPA document to cover upland portions of the facility beyond the structures in the immediate vicinity of the regulated activity that would effect the location and configuration of the regulated activity.

Similarly, if an applicant seeks a DA permit to fill waters or wetlands on which other construction or work is proposed, the control and responsibility of the Corps, as well as its overall Federal involvement would extend to the portions of the project to be located on the permitted fill. However, the NEPA review would be extended to the entire project, including portions outside waters of the United States, only if sufficient Federal control and responsibility over the entire project is determined to exist; that is, if the regulated activities, and those activities involving regulation, funding, etc. by other Federal agencies, comprise a substantial portion of the overall project. In any case, once the scope of analysis has been defined, the NEPA analysis for that action should include direct, indirect and cumulative impacts on all Federal interests within the purview of the NEPA statute. The district engineer should, whenever practicable, incorporate by reference and rely upon the reviews of other Federal and State agencies.

For those regulated activities that comprise merely a link in a transportation or utility transmission project, the scope of analysis should address the Federal action, i.e., the specific activity requiring a DA permit and any other portion of the project that is within the control or responsibility of the Corps of Engineers (or other Federal agencies).

For example, a 50-mile electrical transmission cable crossing a 1 1/4 mile wide river that is a navigable water of the United States requires a DA permit. Neither the origin and destination of the cable not its route to and from the navigable water, except as the route applies to the location and configuration of the crossing, are within the control of the Corps of Engineers. Those matters would not be included in the scope of analysis which, in this case, would address the impacts of the specific cable crossing.

Conversely, for those activities that require a DA permit for a major portion of a transportation or utility transmission project, so that the Corps permit bears upon the origin and destination as well as the route of the project outside the Corps regulatory boundaries, the scope of analysis should include those portions of the project outside the boundaries of the Corps section 10/404 regulatory jurisdiction. To use the same example, if 30 miles of the 50-mile transmission line crossed wetlands or other "waters of the United States," the scope of analysis should reflect impacts on the whole 50-mile transmission line.

For those activities that require a DA permit for a major portion of a shoreside facility, the scope of analysis should extend to upland portions of the facility. For example, a shipping terminal normally requires dredging, wharves, bulkheads, berthing areas and disposal of dredge material in order to function. Permits for such activities are normally considered sufficient Federal control and responsibility to warrant extending the scope of analysis to include the upland portions of the facility.

In all cases, the scope of analysis used for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal.

8. Environmental Impact Statement -- General

. Determination of Lead and Cooperating Agencies. When the district engineer determines that an EIS is required, he will contact all appropriate Federal agencies to determine their respective role(s), i.e., that of lead agency or cooperating agency.

b. Corps as Lead Agency. When the Corps is lead agency, it will be responsible for managing the EIS process, including those portion which come under the jurisdiction of other Federal agencies. The district engineer is authorized to require the applicant to furnish appropriate information as discusses in

paragraph 3 of this appendix. It is permissible for the Corps to reimburse, under agreement, staff support from other Federal agencies beyond the immediate jurisdiction of those agencies.

c. **Corps as Cooperating Agency.** If another agency is the lead agency as set forth by the CEQ regulations (40 CFR 1501.4 and 1501.6(a) and 1508.16), the district engineer will coordinate with that agency as a cooperating agency under 40 CFR 1501.6(b) and 1508.5 to insure that agency's resulting EIS may be adopted by the Corps for purposes of exercising its regulatory authority. As a cooperating agency the Corps will be responsible to the lead agency for providing environmental information which is directly related to the regulatory matter involved and which is required for the preparation of an EIS. This in no way shall be construed as lessening the district engineer's ability to request the applicant to furnish appropriate information as discussed in paragraph 3 of this appendix. responsibility, the district engineer should, in accordance with 40 CFR 1501.6(b)(4), "make available staff support at the lead agency's request" to enhance the latter's interdisciplinary capability provided the request pertains to the Corps regulatory action covered by the EIS, to the extent this is practicable. Beyond this, Corps staff support will generally be made available to the lead agency to the extent practicable within it own responsibility and available resources. Any assistance to a lead agency beyond this will normally be by written agreement with the lead agency providing for the Corps expenses on a cost reimbursable basis. If the district engineer believes a public hearing should be held and another agency is lead agency, the district engineer should request such a hearing and provide his reasoning for the request. The district engineer should suggest a joint hearing and offer to take an active part in the hearing and ensure coverage of the Corps concerns.

d. **Scope of Analysis.** See paragraph 7b.

e. **Scoping Process.** Refer to 40 CFR 1501.7 and 33 CFR 230.12.

f. **Contracting.** See 40 CFR 1506.5.

1. The district engineer may prepare an EIS, or may obtain information needed to prepare an EIS, either with his own staff or by contract. In choosing a contractor who reports directly to the district engineer, the procedures of 40 CFR 1506.5(c) will be followed.

2. Information required for an EIS also may be furnished by the applicant or a consultant employed by the applicant. Where this approach is followed, the district engineer will:

   i. advise the applicant and/or his consultant of the Corps information requirements, and

   ii. (ii) meet with the applicant and/or his consultant from time to time and provide him with the district engineer's views regarding adequacy of the data that are being developed (including how the district engineer will view such data in light of any possible conflicts of interest).

   The applicant and/or his consultant may accept or reject the district engineer's guidance. The district engineer, however, may after specifying the information in contention, require the applicant to resubmit any previously submitted data which the district engineer considers inadequate or inaccurate. In all cases, the district engineer should document in the record the Corps independent evaluation of the information and its accuracy, as required by 40 CFR 1506.5(a).

g. **Change in EIS Determination.** If it is determined that an EIS is not required after a notice of intent has been published, the district engineer shall terminate the EIS preparation and withdraw the notice of intent. The district engineer shall notify in writing the appropriate division engineer; HQUSACE (CECW-OR); the appropriate EPA regional administrator, the Director, Office of Federal Activities the determination.

h. **Time Limits.** For regulatory actions, the district engineer will follow 33 CFR 230.17(a) unless unusual delays caused by applicant inaction or compliance with other statutes require longer time frames for EIS preparation. At the outset of the EIS effort, schedule milestones will be developed and made available to the applicant and the public. If the milestone dates are not met the district engineer will notify the applicant and explain the reason for delay.

9. Organization and Content of Draft EISs

. **General.** This section gives detailed information for preparing draft EISs. When the Corps is the lead agency, this draft EIS format and these procedures will be followed. When the Corps is one of the joint lead agencies, the joint lead agencies will mutually decide which agency's format and procedures will be followed.

b. Format

1. **Cover Sheet.**
   . Ref. 40 CFR 1502.11.
   b. The ``person at the agency who can supply further information'' (40 CFR 1502.11(c) is the project manager handling that permit application.
   c. The cover sheet should identify the EIS as a Corps permit action and state the authorities (sections 9, 10, 404, 103, etc.) under which the Corps is exerting its jurisdiction.
2. **Summary.** In addition to the requirements of 40 CFR 1502.12, action stating the authorities (sections 9, 10, 404, 103, etc.) under which the Corps is exerting its jurisdiction. It shall also summarize the purpose and need for the proposed action and shall briefly state the beneficial/adverse impacts of the proposed action.
3. **Table of Contents.**
4. **Purpose and Need.** See 40 CFR 1502.13. If the scope of analysis for the NEPA document (see paragraph 7b) covers only the proposed specific activity requiring a Department of the Army permit, then the underlying purpose and need for that specific activity should be stated. (For example, ``The purpose and need for the pipe is to obtain cooling water from the river for the electric generating plant.'') If the scope of analysis covers a more extensive project, only part of which may require a DA permit, then the underlying purpose and need for the entire project should be stated. (For example, ``The purpose and need for the electric generating plant is to provide increased supplies of electricity to the (named) geographic area.'') Normally, the applicant should be encouraged to provide a statement of his proposed activity's purpose and need from his perspective (for example, ``to construct an electric generating plant''). However, whenever the NEPA document's scope of analysis renders it appropriate, the Corps also should consider and express that activity's underlying purpose and need from a public interest electric energy''). Also, while generally focusing on the applicant's statement, the Corps, will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective.
5. **Alternatives.** See 40 CFR 1502.14. The Corps is neither an opponent nor a proponent of the applicant's proposal; therefore, the applicant's final proposal will be identified as the ``applicant's preferred alternative'' in the final EIS. Decision options available to the district engineer, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications or conditions or deny the permit.
   . Only reasonable alternatives need be considered in detail, as specified in 40 CFR 1502.14(a). Reasonable alternatives must be those that are feasible and such feasibility must focus on the accomplishment of the underlying purpose and need (of the applicant or the public) that would be satisfied by the proposed Federal action (permit issuance). The alternatives analysis should be thorough enough to use for both the public interest review and the 404(b)(1) guidelines (40 CFR part 230) where applicable. Those alternatives that are unavailable to the applicant, whether or not they require Federal action (permits), should normally be included in the analysis of the no-Federal-action (denial) alternative. Such alternatives and objective evaluation of the public interest and a fully informed decision regarding the permit application.
   b. The ``no-action'' alternative is one which results in no construction requiring a Corps permit. It may be brought by (1) the applicant electing to modify his proposal to eliminate work

under the jurisdiction of the Corps or (2) by the denial of the permit. District engineers, when evaluating this alternative, should discuss, when appropriate, the consequences of other likely uses of a project site, should the permit be denied.

c. The EIS should discuss geographic alternatives, e.g., changes in location and other site specific variables, and functional alternatives, e.g., project substitutes and design modifications.

d. The Corps shall not prepare a cost-benefit analysis for projects requiring a Corps permit. 40 CFR 1502.23 states that the weighing of the various alternatives need not be displayed in a cost-benefit analysis and ``* * * should not be when there are important qualitative considerations." The EIS should, however, indicate any cost considerations that are likely to be relevant to a decision.

e. Mitigation is defined in 40 CFR 1508.20, and Federal action agencies are directed in 40 CFR 1502.14 to include appropriate mitigation measures. Guidance on the conditioning of permits to extent of mitigation conditions are dependent on the results of the public interest review in 33 CFR 320.4.

6. **Environmental Consequences.** See Ref. 40 CFR 1502.16.
7. **List of Preparers.** See Ref. 40 CFR 1502.17.
8. **Public Involvement.** This section should list the dates and nature of all public notices, scoping meetings and public hearings and include a list of all parties notified.
9. **) Appendices.** See 40 CFR 1502.18. Appendices should be used to the maximum extent practicable to minimize the length of the main text of the EIS. Appendices normally should not be circulated with every copy of the EIS, but appropriate appendices should be provided routinely to parties with special interest and expertise in the particular subject.
10. **Index.** The Index of an EIS, at the end of the document, should be designed to provide for easy reference to items discussed in the main text of the EIS.

10. **Notice of Intent.** The district engineer shall follow the guidance in 33 CFR part 230, Appendix C in preparing a notice of intent to prepare a draft EIS for publication in the Federal Register.
11. **Public Hearing.** If a public hearing is to be held pursuant to analyzed by the draft EIS should be considered at the public hearing. The district engineer should make the draft EIS available to the public at least 15 days in advance of the hearing. If a hearing request is received from another agency having jurisdiction as provided in 40 CFR 1506.6(c)(2), the district engineer should coordinate a joint hearing with that agency whenever appropriate.
12. **Organization and Content of Final EIS.** The organization and content of the final EIS including the abbreviated final EIS procedures shall follow the guidance in 33 CFR 230.14(a).
13. **Comments Received on the Final EIS.** For permit cases to be decided at the district level, the district engineer should consider all incoming comments and provide responses when substantive issues are raised which have not been addressed in the final EIS. For permit cases decided at higher authority, the district engineer shall forward the final EIS comment letters together with appropriate responses to higher authority along with the case. In the case of a letter recommending a referral under 40 CFR part 1504, the district engineer will follow the guidance in paragraph 19 of this appendix.
14. **EIS Supplement.** See 33 CFR 230.13(b).
15. **Filing Requirements.** See 40 CFR 1506.9. Five (5) copies of EISs shall be sent to Director, Office of Federal Activities (A-104), Environmental Protection Agency, 401 M Street SW., Washington, DC a notice of availability of the draft or final EISs in the Federal Register. Generally, this notice appears on Friday of each week. At the same time they are mailed to EPA for filing, one copy of each draft or final EIS, or EIS supplement should be mailed to HQUSACE (CECW-OR) WASH DC 20314-1000.
16. **Timing.** 40 CFR 1506.10 describes the timing of an agency action when an EIS is involved.

17. **Expedited Filing.** 40 CFR 1506.10 provides information on allowable time reductions and time extensions associated with the EIS process. The district engineer will provide the necessary information and facts to HQUSACE (CECW-RE) WASH DC 20314-1000 (with copy to CECW-OR) for consultation with EPA for a reduction in the prescribed review periods.
18. **Record of Decision.** In those cases involving an EIS, the statement of findings will be called the record of decision and shall incorporate the requirements of 40 CFR 1505.2. The record of decision is not to be included when filing a final EIS and may not be signed until 30 days after the notice of availability of the final EIS is published in the Federal Register. To avoid duplication, the record of decision may reference the EIS.
19. **Predecision Referrals by Other Agencies.** See 40 CFR part 1504. The decisionmaker should notify any potential referring Federal position of a potential referring agency. (This pertains to a NEPA referral, not a 404(q) referral under the Clean Water Act. The procedures for a 404(q) referral are outlined in the 404(q) Memoranda of Agreement. The potential referring agency will then have 25 calendar days to refer the case to CEQ under 40 CFR part 1504. Referrals will be transmitted through division to CECW-RE for further guidance with an information copy to CECW-OR.
20. **Review of Other Agencies' EISs.** District engineers should provide comments directly to the requesting agency specifically related to the Corps jurisdiction by law or special expertise as defined in 40 CFR 1508.15 and 1508.26 and identified in Appendix II of CEQ regulations (49 FR 49750, December 21, 1984). If the district engineer determines that another agency's draft EIS which involves a Corps permit action is inadequate with respect to the Corps permit action, the district engineer should attempt to resolve the differences concerning the Corps permit action prior to the filing of the final EIS by the other agency. If the district engineer finds that the final EIS is inadequate with respect to the Corps permit action, the district engineer should incorporate the other agency's final EIS or a portion thereof and prepare an appropriate and adequate NEPA document to address the Corps involvement with the proposed action. See 33 CFR 230.21 for guidance. The agency which prepared information to that contained in the EIS in order for the Corps to have all relevant information available for a sound decision on the permit.
21. **Monitoring.** Monitoring compliance with permit requirements should be carried out in accordance with 33 CFR 230.15 and with 33 CFR part 325.

Appendix C - Procedures for the Protection of Historic Properties

AUTHORITY: 33 U.S.C. 401 et seq., 33 U.S.C. 1344, 33 U.S.C. 1413

15. Criteria of Effect and Adverse Effect

1. **Definitions.**

. **"Designated historic property"** is a historic property listed in the National Register of Historic Places (National Register) or which has been determined eligible for listing in the National Register pursuant to 36 CFR Part 63. A historic property that, in both the opinion of the SHPO and the district engineer, appears to meet the criteria for inclusion in the National Register will be treated as a "designated historic property."

b. **"Historic property"** is a property which has historical importance to any person or group. This term includes the types of districts, sites, buildings, structures or objects eligible for inclusion, but not necessarily listed, on the National Register.

c. **"Certified local government"** is a local government certified in accordance with Section 101(c)(1) of the NHPA (See 36 CFR Part 61).

d. The term **"criteria for inclusion in the National Register"** refers to the criteria published by the Department of Interior at 36 CFR 60.4.

e. An **"effect"** on a "designated historic property" occurs when the undertaking may alter the characteristics of the property that qualified the property for inclusion in the National Register. Consideration of effects on "designated historic properties" includes indirect effects of the undertaking. The criteria for effect and adverse effect are described in Paragraph 15 of this Appendix.

f. The term **"undertaking"** as used in this Appendix means the work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations at 33 CFR 320-334.

g. **Permit area.**

1. The term **"permit area"** as used in this appendix means those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures. The following three tests must all be satisfied for an activity undertaken outside the waters of the United States to be included within the "permit area":

i. Such activity would not occur but for the authorization of the work or structures within the waters of the United States;

ii. Such activity must be integrally related to the work or structures to be authorized within waters of the United States. Or, conversely, the work or structures to be authorized must be essential to the completeness of the overall project or program; and

iii. Such activity must be directly associated (first order impact) with the work or structures to be authorized.

2. For example, consider an application for a permit to construct a pier and dredge an access channel so that an industry may be established and operated on an upland area.

i. Assume that the industry requires the access channel and the pier and that without such channel and pier the project would not be feasible. Clearly then, the industrial site, even though upland, would be within the "permit area." It would not be established "but for" the access channel and pier; it also is integrally related to the work and structure to be authorized; and finally it is directly associated with the work and structure to be authorized. Similarly, all three tests are satisfied for the dredged material disposal site and it too is in the "permit area" even if located on uplands.

ii. Consider further that the industry, if established, would cause local agencies to extend water and sewer lines to service the area of the industrial site. Assume that the extension would not itself involve the waters of the United States and is not solely the result of the industrial facility. The extensions would not be within the "permit area" because they would not be directly associated with the work or structure to be authorized.

iii. Now consider that the industry, if established, would require increased housing for its employees, but that a private developer would develop the housing. Again, even if the housing would not be developed but for the authorized work and structure, the housing would not be within the permit area because it would not be directly associated with or integrally related to the work or structure to be authorized.

3. Consider a different example. This time an industry will be established that requires no access to the navigable waters for its operation. The plans for the facility, however, call for a recreational pier with an access channel. The pier and channel will be used for the company-owned yacht and employee recreation. In the example, the industrial site is not included within the permit area. Only areas of dredging, dredged material disposal, and pier construction would be within the permit area.

4. Lastly, consider a linear crossing of the waters of the United States; for example, by a transmission line, pipeline, or highway.

i. Such projects almost always can be undertaken without Corps authorization, if they are designed to avoid affecting the waters of the United States. Corps authorization is sought because it is less expensive or more convenient for the applicant to do so than to avoid affecting the waters of the United States. Thus the "but for" test is not met by the entire project right-of-way. The "same undertaking" and "integral relationship" tests are met, but this is not sufficient to make the whole right-of-way part of the permit area. Typically, however, some portion of the right-of-way, approaching the crossing, would not occur in its given configuration "but for" the authorized activity. This portion of the right-of-way, whose location is determined by the location of the crossing, meets all three tests and hence is part of the permit area.

ii. Accordingly, in the case of the linear crossing, the permit area shall extend in either direction from the crossing to that point at which alternative alignments leading to reasonable alternative locations for the crossing can be considered and evaluated. Such a point may often coincide with the physical feature of the waterbody to be crossed, for example, a bluff, the limit of the flood plain, a vegetational change, etc., or with a jurisdictional feature associated with the waterbody, for example, a zoning change, easement limit, etc., although such features should not be controlling in selecting the limits of the permit area.

2. General Policy.

This Appendix establishes the procedures to be followed by the U.S. Army Corps of Engineers (Corps) to fulfill the requirements set forth in the National Historic Preservation Act (NHPA), other applicable historic preservation laws, and Presidential directives as they relate to the regulatory program of the Corps of Engineers (33 CFR Parts 320-334).

. The district engineer will take into account the effects, if any, of proposed undertakings on historic properties both within and beyond the waters of the U.S. Pursuant to Section 110(f) of the NHPA, the district engineer, where the undertaking that is the subject of a permit action may directly and adversely affect any National Historic Landmark, shall, to the maximum extent possible, condition any issued permit as may be necessary to minimize harm to such landmark.

b. In addition to the requirements of the NHPA, all historic properties are subject to consideration under the National Environmental Policy Act, (33 CFR Part 325, Appendix B), and the Corps' public interest review requirements contained in 33 CFR 320.4. Therefore, historic properties will be included as a factor in the district engineer's decision on a permit application.

c. In processing a permit application, the district engineer will generally accept for Federal or Federally assisted projects the Federal agency's or Federal lead agency's compliance with the requirements of the NHPA.

d. If a permit application requires the preparation of an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act, the draft EIS will contain the information required by paragraph 9.a. below. Furthermore, the SHPO and the ACHP will be given the opportunity to participate in the scoping process and to comment on the Draft and Final EIS.

e. During pre-application consultations with a prospective applicant the district engineer will encourage the consideration of historic properties at the earliest practical time in the planning process.

f. This Appendix is organized to follow the Corps standard permit process and to indicate how historic property considerations are to be addressed during the processing and evaluating of permit applications. The procedures of this Appendix are not intended to diminish the full consideration of historic properties in the Corps regulatory program. Rather, this Appendix is intended to provide for the maximum consideration of historic properties within the time and jurisdictional constraints of the Corps regulatory program. The Corps will make every effort to provide information on historic properties and the effects of proposed undertakings on them to the public by the public notice within the time constraints required by the Clean Water Act. Within the time constraints of applicable laws, executive orders, and regulations, the Corps will provide the maximum coordination and comment opportunities to interested parties especially the SHPO and ACHP. The Corps will discuss with and encourage the applicant to avoid or minimize effects on historic properties. In reaching its decisions on permits, the Corps will adhere to the goals of the NHPA and other applicable laws dealing with historic properties.

3. Initial Review.

. Upon receipt of a completed permit application, the district engineer will consult district files and records, the latest published version(s) of the National Register, lists of properties determined eligible, and other appropriate sources of information to determine if there are any designated historic properties which may be affected by the proposed undertaking. The district engineer will also consult with other appropriate sources of information for knowledge of undesignated historic properties which may be affected by the proposed undertaking. The district engineer will establish procedures (e.g., telephone calls) to obtain supplemental information from the SHPO and other appropriate sources. Such procedures shall be accomplished within the time limits specified in this Appendix and 33 CFR Part 325.

b. In certain instances, the nature, scope, and magnitude of the work, and/or structures to be permitted may be such that there is little likelihood that a historic property exists or may be affected. Where the district engineer determines that such a situation exists, he will include a statement to this effect in the public notice. Three such situations are:

1. Areas that have been extensively modified by previous work. In such areas, historic properties that may have at one time existed within the permit area may be presumed to have been lost unless specific information indicates the presence of such a property (e.g., a shipwreck).

2. Areas which have been created in modern times. Some recently created areas, such as dredged material disposal islands, have had no human habitation. In such cases, it may be presumed that there is no potential for the existence of historic properties unless specific information indicates the presence of such a property.

3. Certain types of work or structures that are of such limited nature and scope that there is little likelihood of impinging upon a historic property even if such properties were to be present within the affected area.

c. If, when using the pre-application procedures of 33 CFR 325.1(b), the district engineer believes that a designated historic property may be affected, he will inform the prospective applicant for consideration during project planning of the potential applicability of the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716). The district engineer will also inform the prospective applicant that the Corps will consider any effects on historic properties in accordance with this Appendix.

d. At the earliest practical time the district engineer will discuss with the applicant measures or alternatives to avoid or minimize effects on historic properties.

4. Public Notice.

. a. Except as specified in subparagraph 4.c., the district engineer's current knowledge of the presence or absence of historic properties and the effects of the undertaking upon these properties will be included in the public notice. The public notice will be sent to the SHPO, the regional office of the National Park Service (NPS), certified local governments (see paragraph 1.c.) and Indian tribes, and interested citizens. If there are designated historic properties which reasonably may be affected by the undertaking or if there are undesignated historic properties within the affected area which the district engineer reasonably expects to be affected by the undertaking and which he believes meet the criteria for inclusion in the National Register, the public notice will also be sent to the ACHP.

b. During permit evaluation for newly designated historic properties or undesignated historic properties which reasonably may be affected by the undertaking and which have been newly identified through the public interest review process, the district engineer will immediately inform the applicant, the SHPO, the appropriate certified local government and the ACHP of the district engineer's current knowledge of the effects of the undertaking upon these properties. Commencing from the date of the district engineer's letter, these entities will be given 30 days to submit their comments.

c. Locational and sensitive information related to archeological sites is excluded from the Freedom of Information Act (Section 304 of the NHPA and Section 9 of ARPA). If the district engineer or the Secretary of the Interior determine that the disclosure of information to the public relating to the location or character of sensitive historic resources may create a substantial risk of harm, theft, or destruction to such resources or to the area or place where such resources are located, then the district engineer will not include such information in the public notice nor otherwise make it available to the public. Therefore, the district engineer will furnish such information to the ACHP and the SHPO by separate notice.

5. Investigations.

. When initial review, additional submissions by the applicant, or response to the public notice indicates the existence of a potentially eligible property, the district engineer shall examine the pertinent evidence to determine the need for further investigation. The evidence must set forth specific reasons for the need to further investigate within the permit area and may consist of:

1. Specific information concerning properties which may be eligible for inclusion in the National Register and which are known to exist in the vicinity of the project; and

2. Specific information concerning known sensitive areas which are likely to yield resources eligible for inclusion in the National Register, particularly where such sensitive area determinations are based upon data collected from other, similar areas within the general vicinity.

b. Where the scope and type of work proposed by the applicant or the evidence presented leads the district engineer to conclude that the chance of disturbance by the undertaking to any potentially eligible historic property is too remote to justify further investigation, he shall so advise the reporting party and the SHPO.

c. If the district engineer's review indicates that an investigation for the presence of potentially eligible historic properties on the upland locations of the permit area (see paragraph 1.g.) is justified, the district engineer will conduct or cause to be conducted such an investigation. Additionally, if the notification indicates that a potentially eligible historic property may exist within waters of the U. S., the district engineer will conduct or cause to be conducted an investigation to determine whether this property may be eligible for inclusion in the National Register. Comments or information of a general nature will not be considered as sufficient evidence to warrant an investigation.

d. In addition to any investigations conducted in accordance with paragraph 6.a. above, the district engineer may conduct or cause to be conducted additional investigations which the district engineer determines are essential to reach the public interest decision. As part of any site visit, Corps personnel will examine the permit area for the presence of potentially eligible historic properties. The Corps will notify the SHPO, if any evidence is found which indicates the presence of potentially eligible historic properties.

e. As determined by the district engineer, investigations may consist of any of the following: further consultations with the SHPO, the State Archeologist, local governments, Indian tribes, local historical and archeological societies, university archeologists, and others with knowledge and expertise in the identification of historical, archeological, cultural and scientific resources; field examinations; and archeological testing. In most cases, the district engineer will require, in accordance with 33 CFR 325.1(e), that the applicant conduct the investigation at his expense and usually by third party contract.

f. The Corps of Engineers' responsibilities to seek eligibility determinations for potentially eligible historic properties is limited to resources located within waters of the U. S. that are directly affected by the undertaking. The Corps responsibilities to identify potentially eligible historic properties is limited to resources located within the permit area that are directly affected by related upland activities. The Corps is not responsible for identifying or assessing potentially eligible historic properties outside the permit area, but will consider the effects of undertakings on any known historic properties that may occur outside the permit area.

6. Eligibility determinations.

. For a historic property within waters of the U. S. that will be directly affected by the undertaking the district engineer will, for the purposes of this Appendix and compliance with the NHPA:

1. treat the historic property as a "designated historic property," if both the SHPO and the district engineer agree that it is eligible for inclusion in the National Register; or

2. treat the historic property as not eligible, if both the SHPO and the district engineer agree that it is not eligible for inclusion in the National Register; or

3. request a determination of eligibility from the Keeper of the National Register in accordance with applicable National Park Service regulations and notify the applicant, if the SHPO and the district engineer disagree or the ACHP or the Secretary of the Interior so request. If the Keeper of the National Register determines that the resources are not eligible for listing in the National Register or fails to respond within 45 days of receipt of the request, the district engineer may proceed to conclude his action on the permit application.

b. For a historic property outside of waters of the U. S. that will be directly affected by the undertaking the district engineer will, for the purposes of this Appendix and compliance with the NHPA:

1. treat the historic property as a "designated historic property," if both the SHPO and the district engineer agree that it is eligible for inclusion in the National Register; or

2. treat the historic property as not eligible, if both the SHPO and the district engineer agree that it is not eligible for inclusion in the National Register; or

3. treat the historic property as not eligible unless the Keeper of the National Register determines it is eligible for or lists it on the National Register. (See paragraph 6.c. below.)

c. If the district engineer and the SHPO do not agree pursuant to paragraph 6.b.(1) and the SHPO notifies the district engineer that it is nominating a potentially eligible historic property for the National Register that may be affected by the undertaking, the district engineer will wait a reasonable period of time for that determination to be made before concluding his action on the permit. Such a reasonable period of time would normally be 30 days for the SHPO to nominate the historic property plus 45 days for the Keeper of the National Register to make such determination. The district engineer will encourage the applicant to cooperate with the SHPO in obtaining the information necessary to nominate the historic property.

7. Assessing Effects.

. **Applying the Criteria of Effect and Adverse Effect.** During the public notice comment period or within 30 days after the determination or discovery of a designated history property the district engineer will coordinate with the SHPO and determine if there is an effect and if so, assess the effect. (See Paragraph 15.)

b. **No Effect.** If the SHPO concurs with the district engineer's determination of no effect or fails to respond

within 15 days of the district engineer's notice to the SHPO of a no effect determination, then the district engineer may proceed with the final decision.

c. **No Adverse Effect.** If the district engineer, based on his coordination with the SHPO (see paragraph 7.a.), determines that an effect is not adverse, the district engineer will notify the ACHP and request the comments of the ACHP. The district engineer's notice will include a description of both the project and the designated historic property; both the district engineer's and the SHPO's views, as well as any views of affected local governments, Indian tribes, Federal agencies, and the public, on the no adverse effect determination; and a description of the efforts to identify historic properties and solicit the views of those above. The district engineer may conclude the permit decision if the ACHP does not object to the district engineer's determination or if the district engineer accepts any conditions requested by the ACHP for a no adverse effect determination, or the ACHP fails to respond within 30 days of the district engineer's notice to the ACHP. If the ACHP objects or the district engineer does not accept the conditions proposed by the ACHP, then the effect shall be considered as adverse.

d. **Adverse Effect.** If an adverse effect on designated historic properties is found, the district engineer will notify the ACHP and coordinate with the SHPO to seek ways to avoid or reduce effects on designated historic properties. Either the district engineer or the SHPO may request the ACHP to participate. At its discretion, the ACHP may participate without such a request. The district engineer, the SHPO or the ACHP may state that further coordination will not be productive. The district engineer shall then request the ACHP's comments in accordance with paragraph 9.

8. **Consultation.** At any time during permit processing, the district engineer may consult with the involved parties to discuss and consider possible alternatives or measures to avoid or minimize the adverse effects of a proposed activity. The district engineer will terminate any consultation immediately upon determining that further consultation is not productive and will immediately notify the consulting parties. If the consultation results in a mutual agreement among the SHPO, ACHP, applicant and the district engineer regarding the treatment of designated historic properties, then the district engineer may formalize that agreement either through permit conditioning or by signing a Memorandum of Agreement (MOA) with these parties. Such MOA will constitute the comments of the ACHP and the SHPO, and the district engineer may proceed with the permit decision. Consultation shall not continue beyond the comment period provided in paragraph 9.b.

9. **ACHP Review and Comment.**

. If:

i. the district engineer determines that coordination with the SHPO is unproductive; or

ii. the ACHP, within the appropriate comment period, requests additional information in order to provide its comments; or

iii. the ACHP objects to any agreed resolution of impacts on designated historic properties;

the district engineer, normally within 30 days, shall provide the ACHP with:

1. a project description, including, as appropriate, photographs, maps, drawings, and specifications (such as, dimensions of structures, fills, or excavations; types of materials and quantity of material);

2. a listing and description of the designated historic properties that will be affected, including the reports from any surveys or investigations;

3. a description of the anticipated adverse effects of the undertaking on the designated historic properties and of the proposed mitigation measures and alternatives considered, if any; and

4. the views of any commenting parties regarding designated historic properties.

In developing this information, the district engineer may coordinate with the applicant, the SHPO, and any appropriate Indian tribe or certified local government. Copies of the above information also should be forwarded to the applicant, the SHPO, and any appropriate Indian tribe or certified local government. The district engineer will not delay his decision but will consider any comments these parties may wish

to provide.

b. b. The district engineer will provide the ACHP 60 days from the date of the district engineer's letter forwarding the information in paragraph 9.a., to provide its comments. If the ACHP does not comment by the end of this comment period, the district engineer will complete processing of the permit application. When the permit decision is otherwise delayed as provided in 33 CFR 325.2(d)(3) & (4), the district engineer will provide additional time for the ACHP to comment consistent with, but not extending beyond that delay.

10. District Engineer Decision.

. In making the public interest decision on a permit application, in accordance with 33 CFR 320.4, the district engineer shall weigh all factors, including the effects of the undertaking on historic properties and any comments of the ACHP and the SHPO, and any views of other interested parties. The district engineer will add permit conditions to avoid or reduce effects on historic properties which he determines are necessary in accordance with 33 CFR 325.4. In reaching his determination, the district engineer will consider the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716).

b. If the district engineer concludes that permitting the activity would result in the irrevocable loss of important scientific, prehistoric, historical, or archeological data, the district engineer, in accordance with the Archeological and Historic Preservation Act of 1974, will advise the Secretary of the Interior (by notifying the National Park Service (NPS)) of the extent to which the data may be lost if the undertaking is permitted, any plans to mitigate such loss that will be implemented, and the permit conditions that will be included to ensure that any required mitigation occurs.

11. Historic Properties Discovered During Construction. After the permit has been issued, if the district engineer finds or is notified that the permit area contains a previously unknown potentially eligible historic property which he reasonably expects will be affected by the undertaking, he shall immediately inform the Department of the Interior Departmental Consulting Archeologist and the regional office of the NPS of the current knowledge of the potentially eligible historic property and the expected effects, if any, of the undertaking on that property. The district engineer will seek voluntary avoidance of construction activities that could affect the historic property pending a recommendation from the National Park Service pursuant to the Archeological and Historic Preservation Act of 1974. Based on the circumstances of the discovery, equity to all parties, and considerations of the public interest, the district engineer may modify, suspend or revoke a permit in accordance with 33 CFR 325.7.

12. Regional General Permits. Potential impacts on historic properties will be considered in development and evaluation of general permits. However, many of the specific procedures contained in this appendix are not normally applicable to general permits. In developing general permits, the district engineer will seek the views of the SHPO and, the ACHP and other organizations and/or individuals with expertise or interest in historic properties. Where designated historic properties are reasonably likely to be affected, general permits shall be conditioned to protect such properties or to limit the applicability of the permit coverage.

13. Nationwide General Permit.

. The criteria at paragraph 15 of this Appendix will be used for determining compliance with the nationwide permit condition at 33 CFR 330.5(b)(9) regarding the effect on designated historic properties. When making this determination the district engineer may consult with the SHPO, the ACHP or other interest parties.

b. If the district engineer is notified of a potentially eligible historic property in accordance with nationwide permit regulations and conditions, he will immediately notify the SHPO. If the district engineer believes that the potentially eligible historic property meets the criteria for inclusion in the National Register and that it may be affected by the proposed undertaking then he may suspend authorization of the nationwide permit until he provides the ACHP and the SHPO the opportunity to comment in accordance with the provisions of this Appendix. Once these provisions have been satisfied, the district engineer may notify the general permittee that the activity is authorized including any special activity specific conditions

identified or that an individual permit is required.

14. **Emergency Procedures.** The procedures for processing permits in emergency situations are described at 33 CFR 325.2(e)(4). In an emergency situation the district engineer will make every reasonable effort to receive comments from the SHPO and the ACHP, when the proposed undertaking can reasonably be expected to affect a potentially eligible or designated historic property and will comply with the provisions of this Appendix to the extent time and the emergency situation allows.

15. **Criteria of Effect and Adverse Effect.**

    . An undertaking has an effect on a designated historic property when the undertaking may alter characteristics of the property that qualified the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant, and depending on a property's important characteristics, should be considered.

    b. An undertaking is considered to have an adverse effect when the effect on a designated historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects on designated historic properties include, but are not limited to:

        1. Physical destruction, damage, or alteration of all or part of the property;

        2. Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register;

        3. Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;

        4. Neglect of a property resulting in its deterioration or destruction; and

        5. Transfer, lease, or sale of the property.

    c. Effects of an undertaking that would otherwise be found to be adverse may be considered as being not adverse for the purpose of this appendix:

        1. When the designated historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines;

        2. When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected designated historic properties through conformance with the Secretary's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings", or

        3. When the undertaking is limited to the transfer, lease, or sale of a designated historic property, and adequate restrictions or conditions are included to ensure preservation of the property's important historic features.

RETURN HOME

Federal Register

Tuesday,

March 28, 2000

Part III

Department of Defense

Department of the Army, Corps of Engineers

33 CFR Parts 320, 326 and 331

Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers; Final Rule

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Parts 320, 326, and 331

Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final rule.

SUMMARY: On July 19, 1995, the Army Corps of Engineers published notice in the **Federal Register** of a proposal to establish an administrative appeal process for the regulatory program of the Department of the Army. The comment period expired on September 5, 1995. The Corps evaluated and addressed the issues raised in comments submitted in response to the proposed rule. In the March 9, 1999, **Federal Register**, the Corps published a final rule establishing an administrative appeal process for permit denials and declined individual permits. Due to budget constraints, the Corps delayed publication of an administrative appeal process for jurisdictional determinations. On September 29, 1999, the President signed the Corps Fiscal Year 2000 appropriations bill which provided funds to administer a one-step appeal process for jurisdictional determinations. The final rule published today establishes a one step administrative appeal process for jurisdictional determinations. In addition, minor changes have been made to clarify the administrative appeal process for permit denials and declined individual permits. These revised regulations contain the complete administrative appeal process for jurisdictional determinations, permit denials, and declined individual permits.

DATES: This rule becomes effective on March 28, 2000.

FOR FURTHER INFORMATION CONTACT: Mr. Sam Collinson, Corps of Engineers Regulatory Branch, (202) 761–0199.

SUPPLEMENTARY INFORMATION:

I. Background

Shortly after coming into office in 1993, the Clinton Administration convened an interagency working group to address concerns with Federal wetlands policy. After hearing from States, tribes, developers, farmers, environmental interests, members of Congress, and scientists, the White House Wetlands Working Group developed a comprehensive, 40-point plan (the Plan) to enhance wetlands protection, while making wetlands regulations more fair, flexible, and effective for everyone, including America's small landowners. The Plan was issued on August 24, 1993. It emphasizes improving Federal wetlands policy through various means, including streamlining wetlands permitting programs. One of several approaches identified in the Plan for achieving such streamlining was the development by the Corps of an administrative appeal process to be implemented after public rulemaking. The Plan discusses an administrative appeal process for Section 404 geographic jurisdictional determinations (JDs) and permit denials. This rule is also contained in the Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions pursuant to Executive Order 12866.

On July 19, 1995, the Corps of Engineers (Corps) published a notice in the **Federal Register** (60 FR 37280) proposing to establish an administrative appeal process for the Department of the Army regulatory program (33 CFR Parts 320–331). The comment period expired on September 5, 1995. The Corps evaluated and addressed the comments submitted in response to the proposed rule. In the March 9, 1999, issue of the **Federal Register** (64 FR 11708), the Corps published a final rule establishing an administrative appeal process for permit denials and declined permits. That rule became effective on August 6, 1999. Due to budget constraints, the Corps delayed the establishment and implementation of an administrative appeal process for JDs. The final rule published today establishes an administrative appeal process for JDs. The administrative appeal process for JDs applies only to geographical JDs that are approved by the Corps of Engineers. In addition, minor edits have been made to clarify the administrative appeal process for permit denials and declined individual permits. That existing process has not been changed by this rule. Published herein is the consolidated 33 CFR Part 331, containing the complete administrative appeal process for JDs, permit denials, and declined individual permits. In Fiscal Years 1995 to 2000 the President's budgets have included money to implement an administrative appeal process for permit denials and JDs. From Fiscal Year (FY) 1995 through FY 1997 the Congressional appropriations for the Department of the Army regulatory program was held level at $101 million. In FY 1998 and FY 1999 Congress appropriated $106 million each year. This funding increase in FY 98 and FY 99 allowed the Corps to finalize regulations to establish and implement an administrative appeal process for permit denials and declined individual permits. In FY 2000 Congress appropriated sufficient funds to implement the administrative appeal process for JDs, that we are finalizing with this consolidated rule, as well as the existing administrative appeal process for permit denials and declined individual permits. The consolidated rule for the administrative appeal process published today provides for the administrative appeal, within the Corps, of an approved JD, a denial with prejudice by the district engineer of a Department of the Army permit application, and/or a declined individual permit (i.e., an individual permit refused by the applicant because of objections to the terms or special conditions of the proffered permit). The appeal process allows administrative appeal of such decisions to the Corps under Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act.

The revised rule provides for the addition of an administrative appeal process for JDs. Although some minor editing of the permit denial appeal regulation has been done, the existing process has not been modified. However, we have published 33 CFR Part 331 in its entirety to include the administrative appeal process for approved JDs and to provide a **Federal Register** document that contains the administrative appeal rule in its entirety. The preamble discussion that follows only addresses comments relating to the administrative appeal process for JDs. The comments relating to the administrative appeal process for permit denials and declined individual permits were discussed in the preamble of the final regulation published in the March 9, 1999, **Federal Register** document.

II. Comments on the Proposed Rule

A. General

Comments received on the proposed rule can be summarized under several broad headings: (1) The type of actions reviewed and the extent of the review; (2) the identity and authority of the review officer (RO); (3) the identity and rights of appellants; (4) the finality of JDs; (5) enforcement-related issues; (6) suggested procedural changes and clarifications; and (7) general expressions of both opposition and support of adoption of an administrative

appeal process. The following discussion of comments is divided into these topics and additional comments on specific sections of the regulation are discussed later in the text.

B. Discussion of Specific Comments

(1) Type of Actions Reviewed and Extent of Review

A number of comments were received requesting that the appeal process be expanded to include the assertion of discretionary authority, issuance of cease and desist orders, special conditions, denial without prejudice of a permit application, delays in the evaluation of a permit application, JDs regarding minor incidental discharges associated with excavation and landclearing activities, and the applicability of exemptions and general permits. Those comments were addressed in the March 9, 1999, **Federal Register** document. For the reasons stated in the March 9, 1999, **Federal Register** document, the Corps is not including an administrative appeal process for determining whether or not a particular activity requires a Section 404 and/or Section 10 permit. It should be noted that the biggest concern of applicants and landowners was the geographic extent of waters of the United States on their property (e.g., wetlands delineation).

There were several comments concerning the scope of the review process. Several commenters recommended that the review officer (RO) consider new information, conducting, in effect, a new and independent review. Other commenters indicated that new information should be accepted only if it serves to clarify existing issues and does not raise new issues that were not considered in the Corps original evaluation of the JD and/or the permit application.

After careful consideration, we have decided that the review undertaken by the RO would be limited to the existing administrative record; however, the RO may seek to clarify the record through consultation with the appellant and his agent(s), the district engineer, other Federal and state agency personnel, or other parties, as described in 33 CFR 331.3 and 331.7.

In the revised rule, we are providing an opportunity for a landowner or applicant to request reconsideration of an approved JD by the district engineer if he has new information that may affect the district engineer's decision concerning a particular JD. (See 33 CFR 331.6(c).) It is essential that new information can only be accepted at the district level, so that the district engineer's decision will reflect an accurate and comprehensive analysis of the data compiled in the administrative record. Accepting new information concerning a JD or project during the appeal process would constitute a fundamental change of the administrative record. Such new information might have resulted in a different JD or permit decision had it been presented to the district engineer during the original decision process. Furthermore, allowing an applicant to withhold potentially critical information from the district engineer and submit it during the appeal process might encourage forum-shopping, if an applicant believes that a more favorable decision might be obtained from the division engineer than from the district engineer. Therefore, once a landowner or applicant submits a request for an appeal of an approved JD or permit denial, he cannot submit new information.

(2) The Identity and Authority of the Review Officer (RO)

Comments were received regarding the appropriate person to serve as the RO and the extent of the RO's authority. Most comments were concerned primarily with ensuring the independence and impartiality of the RO, ensuring the fairness of the administrative appeal process, and providing the RO with the authority to change the original decision regarding the appealed decision. Some commenters also recommended authorizing the RO to unilaterally change a district engineer's permit decision.

Some commenters stated that the administrative appeal process should be conducted outside of the Corps of Engineers, *e.g.,* by contracting with private consultants, utilizing administrative law judges, or referring the appeals to another Federal agency. Several commenters expressed strong support for retaining the appeal process within the Corps, while other commenters expressed an equally strong desire to transfer the appeal process to an independent third party in order to promote impartiality, to avoid the perception of bias, and to enhance the credibility of the process. Simplification and lower program costs were also offered by commenters as reasons for transferring the process to the private sector. Efficiency was also cited by several commenters in support of establishing the appeal process as a single level of review at the division level.

We have reviewed and considered these comments in the context of permit denials and declined individual permits, as discussed in the March 9, 1999, **Federal Register** document. Our responses to those comments also apply to the administrative appeal of approved JDs. Further, Congress in the FY 2000 appropriation for the regulatory program required a one step process for the administrative appeal of JDs.

Several commenters expressed the view that the appeal process should grant authority to the division engineer to unilaterally overturn the permit decision of the district engineer. Otherwise, it was argued, the best result an appellant could hope for would be a new, time-consuming review by the same regulatory project manager who made the original permit recommendation to the district engineer. One commenter stated that such a process is inconsistent with the Corps own assertion that an impartial, objective review requires the final permit decision be made at the division rather than district level.

These comments were addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program. The responses published in that **Federal Register** document also apply to the administrative appeal process for approved JDs. For the administrative appeal of JDs, the authority to make the final appeal decision for approved JDs can be delegated to the ROs or other appropriate officials.

Another commenter suggested modifying the third sentence of § 331.3(b)(2) to provide the RO more flexibility. This commenter recommended striking the phrase ''shall not substitute their judgment for that of the Corps district (when reviewing technical issues) unless the reviewed decision was clearly erroneous or omitted a material fact,'' and replacing it with ''shall provide a recommendation on the decision that is supported by clear and convincing evidence.'' This comment was addressed in the March 9, 1999, **Federal Register** document announcing the final rule for the administrative appeal process for the Corps regulatory program.

A comment was received suggesting more involvement by Corps headquarters to ensure consistency of appealed decisions and to facilitate adjustments in policy, if necessary.

This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

Several commenters suggested that, because of its unique organizational structure, appeals of decisions made by the New England Division office should be directed to Corps headquarters rather than the division engineer. This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

(3) The Identity and Rights of the Appellant

A number of commenters expressed concerns that the proposed administrative appeal process would unduly restrict who may pursue an appeal, that the scope of participation by the appellant was ill-defined, and that appellants should not be required to exhaust the administrative appeal process before seeking relief in the Federal courts. Several commenters recommended broadening the definition of the term ''affected party'' to include adjacent landowners and the general public. Numerous comments were received regarding third party involvement in the administrative appeal process. A number of commenters favored limiting third party involvement to the extent provided for in the proposed rule. Other commenters requested expansion of third party involvement.

For permit denials and declined individual permits, these comments were addressed in the March 9, 1999, **Federal Register** document.

In response to the question regarding who may pursue an appeal, the Corps has modified the definition of the term ''affected party'' to include the permit applicant, the landowner, or the lease, easement, or option holder. The affected party must have received an approved JD or permit denial, or declined a proffered individual permit. Expanding the administrative appeal process to third parties would potentially increase the number of appealed actions by an order of magnitude or more. This would simply be unworkable.

We do not agree that third parties should be allowed to appeal JDs because JDs are primarily site-specific evaluations of technical criteria, such as tide lines or high water marks, hydric soils, hydrophytic vegetation, wetland hydrology, and interstate commerce connections. Adjacent landowners do not typically have knowledge of, or sufficient interest in, a property to become involved in such determinations. Often an adjacent landowner's interests are related to issues other than effects to aquatic resources. We believe that such interests are best addressed by local land use plans and zoning ordinances rather than by seeking to control potential development by challenging Corps JDs. In addition, broadening the definition of ''affected party'' for JDs to include adjacent landowners and the general public would likely produce a tremendous workload increase for the Corps. The Corps annually conducts approximately 60,000 JDs. Consequently, we have decided not to broaden our definition of ''affected party'' to include adjacent landowners and/or the general public. JDs are not subject to a public interest review or third party participation. JD appeals are limited to parties who have the requisite legal interest in the land that is under jurisdictional review. While the appeals regulation provides for some third party involvement, a few commenters have questioned whether the Corps has provided the appropriate level of public involvement. Consequently, the Corps will evaluate the first year of operation of the appeal process relative to third party involvement and will propose any appropriate modification to ensure effective public involvement in the appeal process.

(4) The Finality of Jurisdictional Determinations

A number of comments urged that approved JDs be recognized as ''final agency actions'' apparently under the view that JDs could thereby be immediately appealed in Federal court. However, even final agency actions must be ''ripe'' before a court can review them. In the past, a number of courts have held that jurisdictional determinations are not ripe for review until a landowner who disagrees with a JD has gone through the permitting process. The Federal Government believes this is the correct result, and nothing in today's rule is intended to alter this position. Ultimately, ripeness is a question that only the reviewing court can answer, and the Agency cannot satisfy ripeness concerns simply by declaring that an agency action is ''final.'' Furthermore, JDs are not necessarily ''final'' even as an administrative matter. Physical circumstances can change over time, and the scope of regulatory jurisdiction when a JD is initially performed might be different from the scope of jurisdiction when a permit application is reviewed or when an enforcement action is taken. Accordingly, we have decided not to address in this rulemaking when a JD should be considered a final agency action.

(5) Enforcement-Related Issues

Many commenters questioned our proposal that, as a general rule, JDs made in the context of an enforcement case should not be administratively appealable under this rule, unless an after-the-fact (ATF) permit application was accepted by the Corps. In the proposed rule published in the July 19, 1995, **Federal Register** notice, the district engineer could accept, in exceptional circumstances, an appeal of a JD associated with an unauthorized activity without accepting an ATF permit application.

In response to these comments, we continue to believe that normally it is not appropriate to provide for appeals of approved JDs associated with unauthorized activities, except when the Corps has accepted an ATF permit application and denied it. However, we recognize that there can be rare cases where the interests of justice, fairness and administrative efficiency would be served by allowing the district engineer to accept an appeal of an approved JD without an ATF permit application. Therefore, we have determined that § 331.11 will be adopted as proposed so that the Corps ability to resolve enforcement actions expeditiously is preserved and so that there is not disparate treatment of JDs embodied in EPA and Corps administrative orders.

One commenter suggested that under the proposed rule the ATF permit process should more appropriately be titled an after-the-fact ''enforcement'' process. This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

Several commenters responded to our proposal to amend 33 CFR 326.3(e) to require a tolling agreement as a prerequisite to filing an administrative appeal of an adverse ATF permit decision. Several commenters recommended narrowing the scope of the proposed tolling agreement. As discussed in the March 9, 1999, **Federal Register** document, we determined that it would be appropriate to limit the tolling agreement, and 326.3(e) was amended by adding subparagraph (v). This subparagraph has been revised to include approved JDs.

Sections 326.3(e)(1)(v) and 331.11(c) state that any person alleged to have engaged in an unauthorized activity, who is either allowed to appeal an approved JD or files an ATF permit application that is accepted and processed by the Corps, agrees to a tolling of the Statute of Limitations and must sign an agreement to that effect.

The tolling agreement would state that, in exchange for the Corps accepting the approved JD appeal or ATF permit application, the ATF permit applicant or recipient of an approved JD associated with an unauthorized activity has agreed that the Statute of Limitations would be suspended until one year after the final action has been taken on the approved JD appeal, ATF permit decision, or declined ATF individual permit.

The tolling agreement also applies to any succeeding administrative appeal of an ATF permit denial or declined ATF individual permit. The tolling period would terminate one year after a final decision on (1) the appeal of an approved JD; (2) the appeal of a proffered ATF permit; (3) the denial of an ATF permit application; or, (4) an appeal of such a denial decision, whichever is later. The one year post-decision period is necessary in the event that the United States determines that it would be appropriate to file an action in the Federal courts to obtain a satisfactory remedy for the unauthorized activity.

The tolling agreement would also state that approved JD appellants and permit applicants will not raise a Statute of Limitations defense in any subsequent enforcement action brought by the United States, with respect to the unauthorized activity for the period of time in which the Statute of Limitations is suspended. A separate tolling agreement is required for each unauthorized activity.

One commenter asked that the third sentence in § 331.11 be revised to indicate that the Corps ''receives'' rather than ''may accept'' an after-the-fact permit application, because the commenter believes the Corps could not refuse a permit application. This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

Comments were received questioning the basis of the requirement that initial corrective measures must be completed before an appeal could be accepted. One commenter stated that this requirement left an appellant little recourse, a result that appeared to be contrary to the purpose of the rule. Another believed that such a requirement was premature because it presupposes that the appeal lacks merit. These comments were addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

The proposed rule published in the July 19, 1995, **Federal Register** notice, in § 331.11(b), concerned the calculation of potential penalties for unauthorized activities. That provision stated that ''[A]ny penalty imposed, as determined in the appropriate forum by the appropriate decision-maker, may also include in the calculation of penalty the time period involving the appeal process.'' This provision elicited comments stating that it was both ambiguous and potentially unlawful. In the March 9, 1999, **Federal Register** document, we addressed the comments concerning that issue and explained why that provision was omitted from the final rule.

(6) Suggested Procedural Changes and Clarifications for Specific Sections

Section 331.1: We have revised this section to state that approved JDs, in addition to permit denials with prejudice and declined individual permits, are subject to the administrative appeal process. We have also revised paragraph (b) of this section to describe the level of decision maker and removed paragraph (c) from this section.

Section 331.2: In this section, we have modified some definitions and added new definitions. These changes are discussed below.

Affected party: We have modified the definition of this term to include landowners and lease, easement, or option holders as affected parties. An individual who has an identifiable and substantial legal interest in the property is also considered an ''affected party'' for the purposes of this rule. We have also inserted the phrase ''approved JD'' into the definition since the revised rule now includes approved JDs as appealable actions.

Appealable Action: We have inserted the term ''an approved JD'' into the definition of this term since the revised rule now includes approved JDs in the administrative appeal process.

Approved jurisdictional determination: We have added a definition of this term to this section.

Basis of jurisdictional determination: We added a definition of this term to § 331.2 since the revised rule now includes approved JDs as appealable actions.

Declined permit: We have inserted the word ''special'' before the word ''conditions'' throughout the definition of this term to clarify that general conditions required by Corps regulations are not appealable. Also, special conditions added to an individual permit are usually the reason why proffered individual permits are declined by applicants.

Jurisdictional determination (JD): We have added a definition of this term to § 331.2 since the revised rule now includes approved JDs as appealable actions.

Several commenters said that it was not clear that ''jurisdictional determinations'' includes ''wetland delineation.'' We have modified the language in the introductory comments in the preamble and the language in the rule to clarify that wetland delineations and wetland delineation verifications are jurisdictional determinations. We believe the definition of the term ''jurisdictional determination'' now clearly includes both the finding of Corps regulatory jurisdiction (*i.e.* a determination of the presence of waters of the United States on a parcel of land) and the delineation of boundaries of waters of the United States, including wetlands, on a parcel of land.

Several commenters noted that some sections of the proposed rule referred to the ''current Federal manual for identifying and delineating wetlands'' and the 1987 *Corps of Engineers Wetlands Delineation Manual* as if they were the same.

We acknowledge that this can be confusing. We have changed language in the introductory comments in the preamble and language in the rule to clarify that the 1987 *Corps of Engineers Wetlands Delineation Manual* is the currently accepted Federal manual for identifying and delineating wetlands. Recognizing that a new Federal wetland delineation manual or additional guidance or criteria may be developed in the future, all references within the rule to a delineation manual are made generically as ''the current regulatory criteria for identifying and delineating wetlands'' to minimize the impact to this rule in the event of adoption of a new manual. We have also inserted the phrase ''and associated guidance'' to refer to the guidance that was issued by the Corps in 1992 to clarify the use of the 1987 *Corps of Engineers Wetlands Delineation Manual* and address any potential future guidance that may be issued for a new Federal wetland delineation manual.

Notification of Appeal Process (NAP): We have modified the definition of this term by inserting the phrase ''approved JD'' into the list of actions that are subject to the administrative appeal process.

Preliminary JDs: We have added a definition of this term to this section.

Proffered Permit: We added a definition of this term to § 331.2 to clarify this term to distinguish the

initial proffered permit which is not appealable from the second proffered permit which is an appealable action.

Request for Appeal (RFA): We have modified the definition of this term by inserting the phrase ''approved JD'' into the list of actions that are subject to the administrative appeal process. We have also added the phrase ''* * * to allow the RO to conduct field tests or sampling for purposes directly related to the appeal * * *'' to the end of the third sentence to clarify the reasons necessary for the right of entry.

Tolling agreement: We have added a definition of this term to this section.

Section 331.3(a): One commenter suggested including ''prompt'' with ''fair, reasonable, and effective'' in describing the administrative appeal process to emphasize the Corps commitment to timely action on appeals.

This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

Section 331.3(a)(2): One commenter suggested including the phrase ''based on the merits of the appeal'' in the first sentence.

This comment was addressed in the March 9, 1999, **Federal Register** document announcing the final rule for the administrative appeal process for the Corps regulatory program.

Section 331.4: Several commenters noted that the proposed rule did not contain a list of items that must be present in the administrative record that would be the subject of an administrative appeal.

These comments were addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program. We have added a sentence to this section stating that, for approved JDs, the notification must include an NAP fact sheet, an RFA form, and a basis for JD.

Section 331.5: This section has been revised to include approved JDs as appealable actions. In § 331.5(a)(2) we have added ''incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands'' as a reason for appeal. We have also revised § 331.5(b) by adding three more actions that are not appealable. These actions are: approved JDs associated with an individual permit where the permit has been accepted and signed by the permittee, preliminary JDs, and previously approved JDs that have been superceded by another approved JD.

Section 331.5(b)(1): One commenter suggested that it may not be clear to permit applicants that endorsement of a proffered individual permit indicates acceptance of the permit in its entirety, and effects a waiver of the applicant's right to appeal the terms and special conditions of the permit. This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

Section 331.6: One commenter suggested that we change the rule so that the RFA must be filed within 60 days of the date that the applicant receives the NAP, rather than within 60 days of the date of the NAP. One commenter suggested that it would be difficult for appellants to provide their reasons for requesting an appeal within 60 days unless the Corps provides a rationale as part of the JD or permit denial notification. Another commenter requested that information concerning JDs and permit decisions be made available to the public.

For permit denials and declined individual permits, these comments were addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program. We have modified and expanded § 331.4 to clarify that for JDs, the affected party will be sent a ''basis of JD'' summarizing the information used by the Corps to make the approved JD.

One commenter suggested modifying the sentence addressing ''right of entry'' in § 331.6 of the proposed rule published in the July 19, 1995, **Federal Register** notice to specify that any field tests or sampling by the RO be ''for purposes directly related to the appeal.'' In the final rule published in the March 9, 1999, **Federal Register** document, we had moved this provision from § 331.6 and added it to the definition of ''request for appeal'' in § 331.2. In the revised rule published today, we have added ''to allow the RO to clarify elements of the record or to conduct field test or sampling for purposes directly related to the appeal'' to the end of the third sentence of that definition.

We have modified this section to include approved JDs as appealable actions. We have also added a sentence to § 331.6(e) to require a recipient of a general permit authorization or individual permit to complete the appeal process prior to commencing work in waters of the United States on the project site, if he does not accept the approved JD associated with that general permit authorization or individual permit or the special conditions of the proffered individual permit.

Section 331.7: We have revised this section to include approved JDs as appealable actions.

One commenter asked what the status of a permit application would be during the time an appeal of the JD for the project site is being considered. We acknowledge that there are no provisions addressing this situation in the rule. We understand this concern and are planning to issue guidance to the districts which will allow them flexibility to take appropriate action on individual applications. The district engineer can either continue or suspend the evaluation of the permit application until the appeal is resolved, depending on case-specific considerations. For instance, it may be in the interest of the applicant to continue evaluation of the permit application if the applicant is appealing the geographic limits of waters of the United States or if the applicant needs to comply with other laws which involve extended periods of review, such as consultation under Section 7 of the Endangered Species Act. However, in cases where the Corps must respond to a request for authorization within a specific time period (*e.g.,* the 30-day preconstruction notification period for certain nationwide permit activities), the district engineer should consider the PCN to be incomplete until the administrative appeal process for the approved JD has been completed. If the appeal concerns the issue of jurisdiction, it may be appropriate to suspend permit evaluation until the appeal is resolved, since a subsequent determination of ''no jurisdiction'' would obviate the need to continue the permit evaluation process. Due to the multitude of factors that must be considered for this issue, we have decided not to modify the rule to address this issue, but retain flexibility in the regulation and provide guidance to Corps districts concurrent with implementation of this rule.

Section 331.7(c) (Proposed § 331.8(a)): A number of commenters recommended that we allow division ROs to conduct site visits on appeals of JDs. The JD appeal process proposed in the July 19, 1995, **Federal Register** notice was a two level process, with the first level appeal to the district office that conducted the original JD. The second level appeal would have been to the division office. The district RO would have been allowed to conduct site visits, but not the division RO. In the interests of fairness to appellants, program efficiency, and cost effectiveness, we

have modified the JD appeal process to a one level appeal to the division engineer. Consequently, the division RO will conduct site visits, if necessary, for the purpose of clarifying the administrative record.

Another commenter indicated that we should be required to obtain the landowner's permission before conducting a site inspection and that the landowner and his consultants be allowed to attend.

We believe that if a landowner wishes to request a review of a JD, he must make the site available to the district regulatory staff because a site visit is, under most circumstances, essential to adequately review a particular JD. The RFA is conditioned to grant the Corps right of entry to the project site. Section 331.7(c) requires the RO to notify the appellant and the appellant's authorized agents at least 15 days prior to the site investigation, to provide the appellant and his authorized agents the opportunity to attend the site investigation.

We received many comments concerning the deadlines proposed for appeals of approved JDs. Only one commenter strongly opposed the proposed deadlines; that commenter wanted all decisions reached within 120 days. Most of the commenters acknowledged that there may be seasonal constraints involved in making wetland determinations, unique site conditions, or other circumstances that may affect the timeliness of such decisions. One commenter wanted even greater flexibility than the proposed 12 month time period when there are extenuating circumstances, but another commenter was concerned that Corps districts may request an extension of time due to a ''wet'' season to gain additional time and delay their decisions. Two commenters suggested we follow the same time deadlines as NRCS.

After considering these comments and our proposed deadlines, we believe the time periods are reasonable, and we have retained them in the final rule. We will monitor the JD appeals program and if significant delays are occurring, we will revisit this issue. We have also added text to this section that explains how extenuating circumstances concerning site visits, such as seasonal hydrology, winter weather, or disturbed site conditions, should be addressed.

Section 331.7(d) (Proposed as § 331.7(d)(1)): Several commenters requested clarification of the purpose, location, and notification requirements for the approved JD appeal meeting. These comments, sometimes contradictory, suggested that the meetings should be: (1) informal; (2) more structured; (3) limited to clarification of the administrative record; (4) open to the oral presentation of the appellant's case; and (5) limited to the district staff asking questions rather than providing an opportunity to discuss settlement. One commenter suggested that approved JD appeal meetings should be held in the Corps office.

The language of this section has been modified to clarify that these meetings will be scheduled by the RO to review and discuss issues directly related to the approved JD under appeal. Additionally, we have revised this section to state that that the approved JD meeting should be held at a location of reasonable convenience to the appellant and near the parcel subject to the approved JD, since the site may be a considerable distance from the Corps office. Consequently, we anticipate that the RO may have to travel frequently and have included this factor in our estimate of the cost of the appeal process.

Section 331.7(e)(1) (Formerly § 331.7(d)(1)): Several commenters suggested that the RO should be required to notify the appellant a minimum number of days prior to the date of the appeal conference to ensure that the appellant has sufficient time to schedule and attend the meeting.

We addressed this comment in the March 9, 1999, **Federal Register** document announcing the final rule for the administrative appeal process for the Corps regulatory program.

One commenter suggested that it be made mandatory that complete transcripts be prepared for all presentations and discussions occurring during the appeal conference.

This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

Section 331.7(f) (Formerly § 331.7(e)): One commenter suggested that the RO be allowed to communicate with both the appellant and the Corps district during the appeal process. Another commenter concurred with our initial proposal to prohibit any conversations between the RO and the parties to the appeal, and also suggested that the regulation should explicitly prohibit any conversations regarding the appeal between the RO and any third party.

We addressed these comments in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program. Those responses also apply to the administrative appeal process for approved JDs.

Section 331.7(g) (Formerly § 331.7(f)): We have revised this section to include approved JDs.

Section 331.10: We have made a few minor revisions to this section to clarify that this section applies to Corps permit decisions and not to approved JDs.

In § 331.10(a), we have clarified that the final letter to the applicant will include the original permit denial or proffered permit.

In § 331.10(b), the fourth sentence has been revised by adding the phrase ''permit decisions'' to clarify that the requirements listed in that sentence apply only to permit denials or declined individual permits.

One commenter observed that this section was silent with respect to the roles of the EPA and the NRCS in final agency decisions regarding JDs. This commenter argued that JDs are not only the responsibility of the Corps and that the appeals process should address other authorities in this regard. This rule is promulgated under authority of the Corps of Engineers and thus addresses only Corps approved jurisdictional determinations. Whether or not appeals are available for jurisdictional determinations by other agencies and the process for such appeals lies within the respective authorities of NRCS and EPA. Thus, this rule does not provide for appeal of such jurisdictional determinations, and nothing in this rule is intended to alter or abridge the authority of any other federal agency with respect to jurisdictional determinations for which they are responsible. To further clarify this issue the definition for ''Approved Jurisdictional Determination'' provides that such JDs, which are the only JDs that can be appealed, are ''Corps'' determinations.

Section 331.11: We have revised this section to include approved JDs associated with permit denials and declined individual permits attendant with after-the-fact permit applications. We have also adopted the language in the July 19, 1995, proposed regulation indicating that normally approved JDs associated with unauthorized activities are not appealable except where an after the fact permit application has been accepted by the Corps and denied, unless the Corps determines that extraordinary circumstances warranted such an appeal.

In the last sentence of § 331.11(c), we have also replaced the word ''written'' with ''signed'' to clarify that a signed tolling agreement must be submitted to the district engineer before an after-the-fact permit application or an

administrative appeal associated with an unauthorized activity will be accepted by the district engineer.

Section 331.12: We have revised the last sentence of this section to clarify that this section only applies to permit denials or proffered permits.

(7) General Expressions of Opposition and Support

A number of comments addressed the estimated costs of administering the proposed administrative appeal process. One commenter indicated that our estimated costs were too low. Two commenters said that our estimated costs were too high.

We addressed these comments in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

III. Application of Rule to Prior Regulatory Decisions

Affected parties may appeal approved JDs for those determinations occurring on or after March 28, 2000. Such requests will be accepted for administrative appeal in accordance with this regulation. Approved JDs completed prior to the publication date of the final regulation will not be accepted under the appeal process. During the initial implementation period of these regulations, the RO may delay the processing an RFA for up to 60 days after March 28, 2000.

One commenter asked whether the availability of an administrative appeal process would affect in-process litigation, initiated in response to a permit denied with prejudice after the date of the publication of the final rule in the **Federal Register**. That comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

IV. Environmental Documentation

We have determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment, because the Corps prepares appropriate environmental documentation, including Environmental Impact Statements when required, for all permit decisions. Therefore, environmental documentation under the National Environmental Policy Act (NEPA) is not required for the revision of this rule. Furthermore, JDs do not authorize an applicant or landowner to conduct work in waters of the United States if a Section 404 and/or Section 10 permit is required. JDs only describe presence and extent of waters of the United States based on standard technical criteria. Therefore, environmental documentation under the NEPA is not required for these actions. Moreover, this regulation for administrative appeal only establishes a one-level review for approved JDs, denied permits and declined individual permits, as needed to ensure that applicable regulations, policies, practices, and procedures, including the preparation of appropriate environmental documentation, have been appropriately followed.

V. Executive Order 12291 and the Regulatory Flexibility Act

We do not believe that this revision of the final rule meets the definition of a major rule under Executive Order 12291, and therefore we do not believe that a regulatory impact analysis is required. The revised final rule should reduce the burden on the public by offering an administrative appeal process for certain Corps decisions, and, in many instances, should allow the applicant to avoid the more time-consuming and costly alternative of challenging a Corps permit decision in the Federal courts.

We also do not believe that this revision of the final rule will have a significant impact on a substantial number of small entities pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980, because the revised final rule only creates an optional review of jurisdictional determinations through an administrative appeal process. The final rule should be less time consuming and less costly to permit applicants who want to appeal a decision with which they disagree, but prior to March 9, 1999, could only seek to have the decision reviewed through the Federal courts. In addition, this rule establishes an opportunity for affected parties to appeal approved JDs, which was not available in the past. Furthermore, since the administrative appeal process is optional (*i.e.*, at the applicant's or landowner's discretion), we have minimized the potential of any increased regulatory burden on small entities. If an applicant or landowner chooses to forego an appeal, the net effect of the final rule would be zero.

Note: The term ''he'' and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

List of Subjects

33 CFR Part 320

Administrative practice and procedure, Dams, Environmental protection, Intergovernmental relations, Navigation (water), Water pollution control, Waterways.

33 CFR Part 326

Administrative practice and procedure, Intergovernmental relations, Investigations, Law enforcement, Navigation (water), Penalties, Water pollution control, Waterways.

33 CFR Part 331

Administrative practice and procedure, Environmental protection, Navigation (water), Water pollution control, Waterways.

Dated: March 22, 2000.

Joseph W. Westphal,

Assistant Secretary of the Army (Civil Works), Department of the Army.

Accordingly, 33 CFR, Chapter II is amended as follows:

PART 320—GENERAL REGULATORY POLICIES

1. The authority citation for Part 320 continues to read as follows:

Authority: 33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; 33 U.S.C. 1413.

2. Amend § 320.1 by revising the last five sentences of paragraph (a)(2) to read as follows:

§ 320.1 Purpose and scope.

(a) * * *

(2) * * * A district engineer's decision on an approved jurisdictional determination, a permit denial, or a declined individual permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 CFR Part 331. Such administrative appeal must meet the criteria in 33 CFR 331.5; otherwise, no administrative appeal of that decision is allowed. The terms ''approved jurisdictional determination,'' ''permit denial,'' and ''declined permit'' are defined at 33 CFR 331.2. There shall be no administrative appeal of any issued individual permit that an applicant has accepted, unless the authorized work has not started in waters of the United States, and that issued permit is subsequently modified by the district engineer pursuant to 33 CFR 325.7 (see 33 CFR 331.5(b)(1)). An affected party must exhaust any administrative appeal available pursuant to 33 CFR Part 331 and receive a final Corps decision on the appealed action prior to filing a lawsuit in the Federal courts (see 33 CFR 331.12).

* * * * *

PART 326—ENFORCEMENT

3. The authority citation for Part 326 continues to read as follows:

Authority: 33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; 33 U.S.C. 1413; 33 U.S.C. 2101.

4. Amend § 326.3 to revise paragraph (e)(1)(v) to read as follows:

§ 326.3 Unauthorized activities.

* * * * *

(e) * * *

(1) * * *

(v) No appeal of an approved jurisdictional determination (JD) associated with an unauthorized activity or after-the-fact permit application will be accepted unless and until the applicant has furnished a signed statute of limitations tolling agreement to the district engineer. A separate statute of limitations tolling agreement will be prepared for each unauthorized activity. Any person who appeals an approved JD associated with an unauthorized activity or applies for an after-the-fact permit, where the application is accepted and evaluated by the Corps, thereby agrees that the statute of limitations regarding any violation associated with that application is suspended until one year after the final Corps decision, as defined at 33 CFR 331.10. Moreover, the recipient of an approved JD associated with an unauthorized activity or an application for an after-the-fact permit must also memorialize that agreement to toll the statute of limitations, by signing an agreement to that effect, in exchange for the Corps acceptance of the after-the-fact permit application, and/or any administrative appeal. Such agreement will state that, in exchange for the Corps acceptance of any after-the-fact permit application and/or any administrative appeal associated with the unauthorized activity, the responsible party agrees that the statute of limitations will be suspended (i.e., tolled) until one year after the final Corps decision on the after-the-fact permit application or, if there is an administrative appeal, one year after the final Corps decision as defined at 33 CFR 331.10, whichever date is later.

* * * * *

5. Revise part 331 to read as follows:

PART 331—ADMINISTRATIVE APPEAL PROCESS

Sec.

Authority: 33 U.S.C. 401 *et seq.*, 1344, 1413.

§ 331.1 Purpose and policy.

(a) *General.* The purpose of this Part is to establish policies and procedures to be used for the administrative appeal of approved jurisdictional determinations (JDs), permit applications denied with prejudice, and declined permits. The appeal process will allow the affected party to pursue an administrative appeal of certain Corps of Engineers decisions with which they disagree. The basis for an appeal and the specific policies and procedures of the appeal process are described in the following sections. It shall be the policy of the Corps of Engineers to promote and maintain an administrative appeal process that is independent, objective, fair, prompt, and efficient.

(b) *Level of decision maker.* Appealable actions decided by a division engineer or higher authority may be appealed to an Army official at least one level higher than the decision maker. This higher Army official shall make the decision on the merits of the appeal, and may appoint a qualified individual to act as a review officer (as defined in § 331.2). References to the division engineer in this Part shall be understood as also referring to a higher level Army official when such official is conducting an administrative appeal.

§ 331.2 Definitions.

The terms and definitions contained in 33 CFR Parts 320 through 330 are applicable to this part. In addition, the following terms are defined for the purposes of this part:

Affected party means a permit applicant, landowner, a lease, easement or option holder (*i.e.*, an individual who has an identifiable and substantial legal interest in the property) who has received an approved JD, permit denial, or has declined a proffered individual permit.

Agent(s) means the affected party's business partner, attorney, consultant, engineer, planner, or any individual with legal authority to represent the appellant's interests.

Appealable action means an approved JD, a permit denial, or a declined permit, as these terms are defined in this section.

Appellant means an affected party who has filed an appeal of an approved JD, a permit denial or declined permit under the criteria and procedures of this part.

Approved jurisdictional determination means a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.

Basis of Jurisdictional determination is a summary of the indicators that support the Corps approved JD. Indicators supporting the Corps approved JD can include, but are not limited to: indicators of wetland hydrology, hydric soils, and hydrophytic plant communities; indicators of ordinary high water marks, high tide lines, or mean high water marks; indicators of adjacency to navigable or interstate waters; indicators that the wetland or waterbody is of part of a tributary system; or indicators of linkages between isolated water bodies and interstate or foreign commerce.

Declined permit means a proffered individual permit, including a letter of permission, that an applicant has refused to accept, because he has objections to the terms and special conditions therein. A declined permit can also be an individual permit that the applicant originally accepted, but where such permit was subsequently modified by the district engineer, pursuant to 33 CFR 325.7, in such a manner that the resulting permit contains terms and special conditions that lead the applicant to decline the modified permit, provided that the applicant has not started work in waters of the United States authorized by such permit. Where an applicant declines a permit (either initial or modified), the applicant does not have a valid permit to conduct regulated activities in waters of the United States, and must not begin construction of the work requiring a Corps permit unless and until the applicant receives and accepts a valid Corps permit.

Denial determination means a letter from the district engineer detailing the reasons a permit was denied with prejudice. The decision document for

the project will be attached to the denial determination in all cases.

Jurisdictional determination (JD) means a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*). Additionally, the term includes a written reverification of expired JDs and a written reverification of JDs where new information has become available that may affect the previously written determination. For example, such geographic JDs may include, but are not limited to, one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other waters of the United States. All JDs will be in writing and will be identified as either preliminary or approved. JDs do not include determinations that a particular activity requires a DA permit.

Notification of Appeal Process (NAP) means a fact sheet that explains the criteria and procedures of the administrative appeal process. Every approved JD, permit denial, and every proffered individual permit returned for reconsideration after review by the district engineer in accordance with § 331.6(b) will have an NAP form attached.

Notification of Applicant Options (NAO) means a fact sheet explaining an applicant's options with a proffered individual permit under the administrative appeal process.

Permit denial means a written denial with prejudice (see 33 CFR 320.4(j)) of an individual permit application as defined in 33 CFR 325.5(b).

Preliminary JDs are written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel. Preliminary JDs are advisory in nature and may not be appealed. Preliminary JDs include compliance orders that have an implicit JD, but no approved JD.

Proffered permit means a permit that is sent to an applicant that is in the proper format for the applicant to sign (for a standard permit) or accept (for a letter of permission). The term ''initial proffered permit'' as used in this part refers to the first time a permit is sent to the applicant. The initial proffered permit is not an appealable action. However, the applicant may object to the terms or conditions of the initial proffered permit and, if so, a second reconsidered permit will be sent to the applicant. The term ''proffered permit'' as used in this part refers to the second permit that is sent to the applicant. Such proffered permit is an appealable action.

Request for appeal (RFA) means the affected party's official request to initiate the appeal process. The RFA must include the name of the affected party, the Corps file number of the approved JD, denied permit, or declined permit, the reason(s) for the appeal, and any supporting data and information. No new information may be submitted. A grant of right of entry for the Corps to the project site is a condition of the RFA to allow the RO to clarify elements of the record or to conduct field tests or sampling for purposes directly related to the appeal. A standard RFA form will be provided to the affected party with the NAP form. For appeals of decisions related to unauthorized activities a signed tolling agreement, as required by 33 CFR 326.3(e)(1)(v), must be included with the RFA, unless a signed tolling agreement has previously been furnished to the Corps district office. The affected party initiates the administrative appeal process by providing an acceptable RFA to the appropriate Corps of Engineers division office. An acceptable RFA contains all the required information and provides reasons for appeal that meets the criteria identified in § 331.5.

Review officer (RO) means the Corps official responsible for assisting the division engineer or higher authority responsible for rendering the final decision on the merits of an appeal.

Tolling agreement refers to a document signed by any person who appeals an approved JD associated with an unauthorized activity or applies for an after-the-fact (ATF) permit, where the application is accepted and evaluated by the Corps. The agreement states that the affected party agrees to have the statute of limitations regarding any violation associated with that approved JD or application ''tolled'' or temporarily set aside until one year after the final Corps decision, as defined at § 331.10. No ATF permit application or administrative appeal associated with an unauthorized activity will be accepted until a tolling agreement is furnished to the district engineer.

§ 331.3 Review officer.

(a) *Authority.* (1) The division engineer has the authority and responsibility for administering a fair, reasonable, prompt, and effective administrative appeal process. The division engineer may act as the review officer (RO), or may delegate, either generically or on a case-by-case basis, any authority or responsibility described in this part as that of the RO. With the exception of JDs, as described in this paragraph (a)(1), the division engineer may not delegate any authority or responsibility described in this part as that of the division engineer. For approved JDs only, the division engineer may delegate any authority or responsibility described in this part as that of the division engineer, including the final appeal decision. In such cases, any delegated authority must be granted to an official that is at the same or higher grade level than the grade level of the official that signed the approved JD. Regardless of any delegation of authority or responsibility for ROs or for final appeal decisions for approved JDs, the division engineer retains overall responsibility for the administrative appeal process.

(2) The RO will assist the division engineer in reaching and documenting the division engineer's decision on the merits of an appeal, if the division engineer has delegated this responsibility as explained in paragraph (a)(1) of this section. The division engineer has the authority to make the final decision on the merits of the appeal. Neither the RO nor the division engineer has the authority to make a final decision to issue or deny any particular permit nor to make an approved JD, pursuant to the administrative appeal process established by this part. The authority to issue or deny permits remains with the district engineer. However, the division engineer may exercise the authority at 33 CFR 325.8(c) to elevate any permit application, and subsequently make the final permit decision. In such a case, any appeal process of the district engineer's initial decision is terminated. If a particular permit application is elevated to the division engineer pursuant to 33 CFR 325.8(c), and the division engineer's decision on the permit application is a permit denial or results in a declined permit, that permit denial or declined permit would be subject to an administrative appeal to the Chief of Engineers.

(3) *Qualifications.* The RO will be a Corps employee with extensive knowledge of the Corps regulatory program. Where the permit decision being appealed was made by the division engineer or higher authority, a Corps official at least one level higher than the decision maker shall make the decision on the merits of the RFA, and

this Corps official shall appoint a qualified individual as the RO to conduct the appeal process.

(b) *General*—(1) *Independence.* The RO will not perform, or have been involved with, the preparation, review, or decision making of the action being appealed. The RO will be independent and impartial in reviewing any appeal, and when assisting the division engineer to make a decision on the merits of the appeal.

(2) *Review.* The RO will conduct an independent review of the administrative record to address the reasons for the appeal cited by the applicant in the RFA. In addition, to the extent that it is practicable and feasible, the RO will also conduct an independent review of the administrative record to verify that the record provides an adequate and reasonable basis supporting the district engineer's decision, that facts or analysis essential to the district engineer's decision have not been omitted from the administrative record, and that all relevant requirements of law, regulations, and officially promulgated Corps policy guidance have been satisfied. Should the RO require expert advice regarding any subject, he may seek such advice from any employee of the Corps or of another Federal or state agency, or from any recognized expert, so long as that person had not been previously involved in the action under review.

§ 331.4 Notification of appealable actions.

Affected parties will be notified in writing of a Corps decision on those activities that are eligible for an appeal. For approved JDs, the notification must include an NAP fact sheet, an RFA form, and a basis of JD. For permit denials, the notification must include a copy of the decision document for the permit application, an NAP fact sheet and an RFA form. For proffered individual permits, when the initial proffered permit is sent to the applicant, the notification must include an NAO fact sheet. For declined permits (i.e., proffered individual permits that the applicant refuses to accept and sends back to the Corps), the notification must include an NAP fact sheet and an RFA form. Additionally, an affected party has the right to obtain a copy of the administrative record.

§ 331.5 Criteria.

(a) *Criteria for appeal*—(1) *Submission of RFA.* The appellant must submit a completed RFA (as defined at § 331.2) to the appropriate division office in order to appeal an approved JD, a permit denial, or a declined permit. An individual permit that has been signed by the applicant, and subsequently unilaterally modified by the district engineer pursuant to 33 CFR 325.7, may be appealed under this process, provided that the applicant has not started work in waters of the United States authorized by the permit. The RFA must be received by the division engineer within 60 days of the date of the NAP.

(2) *Reasons for appeal.* The reason(s) for requesting an appeal of an approved JD, a permit denial, or a declined permit must be specifically stated in the RFA and must be more than a simple request for appeal because the affected party did not like the approved JD, permit decision, or the permit conditions. Examples of reasons for appeals include, but are not limited to, the following: A procedural error; an incorrect application of law, regulation or officially promulgated policy; omission of material fact; incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands; incorrect application of the Section 404(b)(1) Guidelines (see 40 CFR Part 230); or use of incorrect data. The reasons for appealing a permit denial or a declined permit may include jurisdiction issues, whether or not a previous approved JD was appealed.

(b) *Actions not appealable.* An action or decision is not subject to an administrative appeal under this part if it falls into one or more of the following categories:

(1) An individual permit decision (including a letter of permission or a standard permit with special conditions), where the permit has been accepted and signed by the permittee. By signing the permit, the applicant waives all rights to appeal the terms and conditions of the permit, unless the authorized work has not started in waters of the United States and that issued permit is subsequently modified by the district engineer pursuant to 33 CFR 325.7;

(2) Any site-specific matter that has been the subject of a final decision of the Federal courts;

(3) A final Corps decision that has resulted from additional analysis and evaluation, as directed by a final appeal decision;

(4) A permit denial without prejudice or a declined permit, where the controlling factor cannot be changed by the Corps decision maker (*e.g.,* the requirements of a binding statute, regulation, state Section 401 water quality certification, state coastal zone management disapproval, *etc.* (See 33 CFR 320.4(j));

(5) A permit denial case where the applicant has subsequently modified the proposed project, because this would constitute an amended application that would require a new public interest review, rather than an appeal of the existing record and decision;

(6) Any request for the appeal of an approved JD, a denied permit, or a declined permit where the RFA has not been received by the division engineer within 60 days of the date of the NAP;

(7) A previously approved JD that has been superceded by another approved JD based on new information or data submitted by the applicant. The new approved JD is an appealable action;

(8) An approved JD associated with an individual permit where the permit has been accepted and signed by the permittee;

(9) A preliminary JD; or

(10) A JD associated with unauthorized activities except as provided in § 331.11.

§ 331.6 Filing an appeal.

(a) An affected party appealing an approved JD, permit denial or declined permit must submit an RFA that is received by the division engineer within 60 days of the date of the NAP. Flow charts illustrating the appeal process are in the Appendices of this part.

(b) In the case where an applicant objects to an initial proffered individual permit, the appeal process proceeds as follows. To initiate the appeal process regarding the terms and special conditions of the permit, the applicant must write a letter to the district engineer explaining his objections to the permit. The district engineer, upon evaluation of the applicant's objections, may: Modify the permit to address all of the applicant's objections or modify the permit to address some, but not all, of the applicant's objections, or not modify the permit, having determined that the permit should be issued as previously written. In the event that the district engineer agrees to modify the initial proffered individual permit to address all of the applicant's objections, the district engineer will proffer such modified permit to the applicant, enclosing an NAP fact sheet and an RFA form as well. Should the district engineer modify the initial proffered individual permit to address some, but not all, of the applicant's objections, the district engineer will proffer such modified permit to the applicant, enclosing an NAP fact sheet, RFA form, and a copy of the decision document for the project. If the district engineer does not modify the initial proffered individual permit, the district engineer will proffer the unmodified permit to

the applicant a second time, enclosing an NAP fact sheet, an RFA form, and a copy of the decision document. If the applicant still has objections, after receiving the second proffered permit (modified or unmodified), the applicant may decline such proffered permit; this declined permit may be appealed to the division engineer upon submittal of a complete RFA form. The completed RFA must be received by the division engineer within 60 days of the NAP. A flow chart of an applicant's options for an initial proffered individual permit is shown in Appendix B of this part. A flow chart of the appeal process for a permit denial or a declined permit (*i.e.*, a proffered permit declined after the Corps decision on the applicant's objections to the initial proffered permit) is shown in Appendix A of this part. A flow chart of the appeal process for an approved jurisdictional determination is shown in Appendix C of this part. A flow chart of the process for when an unacceptable request for appeal is returned to an applicant is shown in Appendix D of this part.

(c) An approved JD will be reconsidered by the district engineer if the affected party submits new information or data to the district engineer within 60 days of the date of the NAP. (An RFA that contains new information will either be returned to the district engineer for reconsideration or the appeal will be processed if the applicant withdraws the new information.) The district engineer has 60 days from the receipt of such new information or data to review the new information or data, consider whether or not that information changes the previously approved JD, and, reissue the approved JD or issue a new approved JD. The reconsideration of an approved JD by the district engineer does not commence the administrative appeal process. The affected party may appeal the district engineer's reissued or new approved JD.

(d) The district engineer may not delegate his signature authority to deny the permit with prejudice or to return an individual permit to the applicant with unresolved objections. The district engineer may delegate signature authority for JDs, including approved JDs.

(e) Affected parties may appeal approved JDs where the determination was dated after March 28, 2000, but may not appeal approved JDs dated on or before March 28, 2000. The Corps will begin processing JD appeals no later than May 30, 2000. All appeals must meet the criteria set forth in § 331.5. If work is authorized by either general or individual permit, and the affected party wishes to request an appeal of the JD associated with the general permit authorization or individual permit or the special conditions of the proffered individual permit, the appeal must be received by the Corps and the appeal process concluded prior to the commencement of any work in waters of the United States and prior to any work that could alter the hydrology of waters of the United States.

§ 331.7 Review procedures.

(a) *General.* The administrative appeal process for approved JDs, permit denials, and declined permits is a one level appeal, normally to the division engineer. The appeal process will normally be conducted by the RO. The RO will document the appeal process, and assist the division engineer in making a decision on the merits of the appeal. The division engineer may participate in the appeal process as the division engineer deems appropriate. The division engineer will make the decision on the merits of the appeal, and provide any instructions, as appropriate, to the district engineer.

(b) *Requests for the appeal of approved JDs, permit denials, or declined permits.* Upon receipt of an RFA, the RO shall review the RFA to determine whether the RFA is acceptable (*i.e.*, complete and meets the criteria for appeal). If the RFA is acceptable, the RO will so notify the appellant in writing within 30 days of the receipt of the acceptable RFA. If the RO determines that the RFA is not complete the RO will so notify the appellant in writing within 30 days of the receipt of the RFA detailing the reason(s) why the RFA is not complete. If the RO believes that the RFA does not meet the criteria for appeal (see § 331.5), the RO will make a recommendation on the RFA to the division engineer. If the division engineer determines that the RFA is not acceptable, the division engineer will notify the appellant of this determination by a certified letter detailing the reason(s) why the appeal failed to meet the criteria for appeal. No further administrative appeal is available, unless the appellant revises the RFA to correct the deficiencies noted in the division engineer's letter or the RO's letter. The revised RFA must be received by the division engineer within 30 days of the date of the Corps letter indicating that the initial RFA is not acceptable. If the RO determines that the revised RFA is still not complete, the RO will again so notify the appellant in writing within 30 days of the receipt of the RFA detailing the reason(s) why the RFA is not complete. If the division engineer determines that the revised RFA is still not acceptable, the division engineer will notify the appellant of this determination by a certified letter within 30 days of the date of the receipt of the revised RFA, and will advise the appellant that the matter is not eligible for appeal. No further RFAs will be accepted after this point.

(c) *Site investigations.* Within 30 days of receipt of an acceptable RFA, the RO should determine if a site investigation is needed to clarify the administrative record. The RO should normally conduct any such site investigation within 60 days of receipt of an acceptable RFA. The RO may also conduct a site investigation at the request of the appellant, provided the RO has determined that such an investigation would be of benefit in interpreting the administrative record. The appellant and the appellant's authorized agent(s) must be provided an opportunity to participate in any site investigation, and will be given 15 days notice of any site investigation. The RO will attempt to schedule any site investigation at the earliest practicable time acceptable to both the RO and the appellant. The RO, the appellant, the appellant's agent(s) and the Corps district staff are authorized participants at any site investigation. The RO may also invite any other party the RO has determined to be appropriate, such as any technical experts consulted by the Corps. For permit denials and declined permit appeals, any site investigation should be scheduled in conjunction with the appeal review conference, where practicable. If extenuating circumstances occur at the site that preclude the appellant and/or the RO from conducting any required site visit within 60 days, the RO may extend the time period for review. Examples of extenuating circumstances may include seasonal hydrologic conditions, winter weather, or disturbed site conditions. The site visit must be conducted as soon as practicable as allowed by the extenuating circumstances, however, in no case shall any site visit extend the total appeals process beyond twelve months from the date of receipt of the RFA. If any site visit delay is necessary, the RO will notify the appellant in writing.

(d) *Approved JD appeal meeting.* The RO may schedule an informal meeting moderated by the RO or conference call with the appellant, his authorized agent, or both, and appropriate Corps regulatory personnel to review and discuss issues directly related to the appeal for the purpose of clarifying the administrative record. If a meeting is held, the appellant will bear his own

costs associated with necessary arrangements, exhibits, travel, and representatives. The approved JD appeal meeting should be held at a location of reasonable convenience to the appellant and near the site where the approved JD was conducted.

(e) *Permit denials and declined permits appeal conference.* Conferences held in accordance with this part will be informal, and will be chaired by the RO. The purpose of the appeal conference is to provide a forum that allows the participants to discuss freely all relevant issues and material facts associated with the appeal. An appeal conference will be held for every appeal of a permit denial or a declined permit, unless the RO and the appellant mutually agree to forego a conference. The conference will take place within 60 days of receipt of an acceptable RFA, unless the RO determines that unforeseen or unusual circumstances require scheduling the conference for a later date. The purpose of the conference will be to allow the appellant and the Corps district representatives to discuss supporting data and information on issues previously identified in the administrative record, and to allow the RO the opportunity to clarify elements of the administrative record. Presentations by the appellant and the Corps district representatives may include interpretation, clarification, or explanation of the legal, policy, and factual bases for their positions. The conference will be governed by the following guidelines:

(1) *Notification.* The RO will set a date, time, and location for the conference. The RO will notify the appellant and the Corps district office in writing within 30 days of receipt of the RFA, and not less than 15 days before the date of the conference.

(2) *Facilities.* The conference will be held at a location that has suitable facilities and that is reasonably convenient to the appellant, preferably in the proximity of the project site. Public facilities available at no expense are preferred. If a free facility is not available, the Corps will pay the cost for the facility.

(3) *Participants.* The RO, the appellant, the appellant's agent(s) and the Corps district staff are authorized participants in the conference. The RO may also invite any other party the RO has determined to be appropriate, such as any technical experts consulted by the Corps, adjacent property owners or Federal or state agency personnel to clarify elements of the administrative record. The division engineer and/or the district engineer may attend the conference at their discretion. If the appellant or his authorized agent(s) fail to attend the appeal conference, the appeal process is terminated, unless the RO excuses the appellant for a justifiable reason. Furthermore, should the process be terminated in such a manner, the district engineer's original decision on the appealed action will be sustained.

(4) *The role of the RO.* The RO shall be in charge of conducting the conference. The RO shall open the conference with a summary of the policies and procedures for conducting the conference. The RO will conduct a fair and impartial conference, hear and fully consider all relevant issues and facts, and seek clarification of any issues of the administrative record, as needed, to allow the division engineer to make a final determination on the merits of the appeal. The RO will also be responsible for documenting the appeal conference.

(5) *Appellant rights.* The appellant, and/or the appellant's authorized agent(s), will be given a reasonable opportunity to present the appellant's views regarding the subject permit denial or declined permit.

(6) *Subject matter.* The purpose of the appeal conference will be to discuss the reasons for appeal contained in the RFA. Any material in the administrative record may be discussed during the conference, but the discussion should be focused on relevant issues needed to address the reasons for appeal contained in the RFA. The RO may question the appellant or the Corps representatives with respect to interpretation of particular issues in the record, or otherwise to clarify elements of the administrative record. Issues not identified in the administrative record by the date of the NAP for the application may not be raised or discussed, because substantive new information or project modifications would be treated as a new permit application (see § 331.5(b)(5)).

(7) *Documentation of the appeal conference.* The appeal conference is an informal proceeding, intended to provide clarifications and explanations of the administrative record for the RO and the division engineer; it is not intended to supplement the administrative record. Consequently, the proceedings of the conference will not be recorded verbatim by the Corps or any other party attending the conference, and no verbatim transcripts of the conference will be made. However, after the conference, the RO will write a memorandum for the record (MFR) summarizing the presentations made at the conference, and will provide a copy of that MFR to the division engineer, the appellant, and the district engineer.

(8) *Appellant costs.* The appellant will be responsible for his own expenses for attending the appeal conference.

(f) *Basis of decision and communication with the RO.* The appeal of an approved JD, a permit denial, or a declined permit is limited to the information contained in the administrative record by the date of the NAP for the application or approved JD, the proceedings of the appeal conference, and any relevant information gathered by the RO as described in § 331.5. Neither the appellant nor the Corps may present new information not already contained in the administrative record, but both parties may interpret, clarify or explain issues and information contained in the record.

(g) *Applicability of appeal decisions.* Because a decision to determine geographic jurisdiction, deny a permit, or condition a permit depends on the facts, circumstances, and physical conditions particular to the specific project and/or site being evaluated, appeal decisions would be of little or no precedential utility. Therefore, an appeal decision of the division engineer is applicable only to the instant appeal, and has no other precedential effect. Such a decision may not be cited in any other administrative appeal, and may not be used as precedent for the evaluation of any other jurisdictional determination or permit application. While administrative appeal decisions lack precedential value and may not be cited by an appellant or a district engineer in any other appeal proceeding, the Corps goal is to have the Corps regulatory program operate as consistently as possible, particularly with respect to interpretations of law, regulation, an Executive Order, and officially-promulgated policy. Therefore, a copy of each appeal decision will be forwarded to Corps Headquarters; those decisions will be periodically reviewed at the headquarters level for consistency with law, Executive Orders, and policy. Additional official guidance will be issued as necessary to maintain or improve the consistency of the Corps' appellate and permit decisions.

§ 331.8 Timeframes for final appeal decisions.

The Division Engineer will make a final decision on the merits of the appeal at the earliest practicable time, in accordance with the following time limits. The administrative appeal process is initiated by the receipt of an RFA by the division engineer. The

Corps will review the RFA to determine whether the RFA is acceptable. The Corps will notify the appellant accordingly within 30 days of the receipt of the RFA in accordance with § 331.7(b). If the Corps determines that the RFA is acceptable, the RO will immediately request the administrative record from the district engineer. The division engineer will normally make a final decision on the merits of the appeal within 90 days of the receipt of an acceptable RFA unless any site visit is delayed pursuant to § 331.7(c). In such case, the RO will complete the appeal review and the division engineer will make a final appeal decision within 30 days of the site visit. In no case will a site visit delay extend the total appeal process beyond twelve months from the date of receipt of an acceptable RFA.

§ 331.9 Final appeal decision.

(a) In accordance with the authorities contained in § 331.3(a), the division engineer will make a decision on the merits of the appeal. While reviewing an appeal and reaching a decision on the merits of an appeal, the division engineer can consult with or seek information from any person, including the district engineer.

(b) The division engineer will disapprove the entirety of or any part of the district engineer's decision only if he determines that the decision on some relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance. The division engineer will not attempt to substitute his judgment for that of the district engineer regarding a matter of fact, so long as the district engineer's determination was supported by substantial evidence in the administrative record, or regarding any other matter if the district engineer's determination was reasonable and within the zone of discretion delegated to the district engineer by Corps regulations. The division engineer may instruct the district engineer on how to correct any procedural error that was prejudicial to the appellant (i.e., that was not a ''harmless'' procedural error), or to reconsider the decision where any essential part of the district engineer's decision was not supported by accurate or sufficient information, or analysis, in the administrative record. The division engineer will document his decision on the merits of the appeal in writing, and provide a copy of this decision to the applicant (using certified mail) and the district engineer.

(c) The final decision of the division engineer on the merits of the appeal will conclude the administrative appeal process, and this decision will be filed in the administrative record for the project.

§ 331.10 Final Corps decision.

The final Corps decision on a permit application is the initial decision to issue or deny a permit, unless the applicant submits an RFA, and the division engineer accepts the RFA, pursuant to this Part. The final Corps decision on an appealed action is as follows:

(a) If the division engineer determines that the appeal is without merit, the final Corps decision is the district engineer's letter advising the applicant that the division engineer has decided that the appeal is without merit, confirming the district engineer's initial decision, and sending the permit denial or the proffered permit for signature to the appellant; or

(b) If the division engineer determines that the appeal has merit, the final Corps decision is the district engineer's decision made pursuant to the division engineer's remand of the appealed action. The division engineer will remand the decision to the district engineer with specific instructions to review the administrative record, and to further analyze or evaluate specific issues. If the district engineer determines that the effects of the district engineer's reconsideration of the administrative record would be narrow in scope and impact, the district engineer must provide notification only to those parties who commented or participated in the original review, and would allow 15 days for the submission of supplemental comments. For permit decisions, where the district engineer determines that the effect of the district engineer's reconsideration of the administrative record would be substantial in scope and impact, the district engineer's review process will include issuance of a new public notice, and/or preparation of a supplemental environmental analysis and decision document (see 33 CFR 325.7). Subsequently, the district engineer's decision made pursuant to the division engineer's remand of the appealed action becomes the final Corps permit decision. Nothing in this part precludes the agencies' authorities pursuant to Section 404(q) of the Clean Water Act.

§ 331.11 Unauthorized activities.

Approved JDs, permit denials, and declined permits associated with after-the-fact permit applications are appealable actions for the purposes of this part. If the Corps accepts an after-the-fact permit application, an administrative appeal of an approved JD, permit denial, or declined permit may be filed and processed in accordance with these regulations subject to the provisions of paragraphs (a), (b), and (c) of this section. An appeal of an approved JD associated with unauthorized activities will normally not be accepted unless the Corps accepts an after-the-fact permit application. However, in rare cases, the district engineer may accept an appeal of such an approved JD, if the district engineer determines that the interests of justice, fairness, and administrative efficiency would be served thereby. Furthermore, no such appeal will be accepted if the unauthorized activity is the subject of a referral to the Department of Justice or the EPA, or for which the EPA has the lead enforcement authority or has requested lead enforcement authority.

(a) *Initial corrective measures.* If the district engineer determines that initial corrective measures are necessary pursuant to 33 CFR 326.3(d), an RFA for an appealable action will not be accepted by the Corps, until the initial corrective measures have been completed to the satisfaction of the district engineer.

(b) *Penalties.* If an affected party requests, under this Section, an administrative appeal of an appealable action prior to the resolution of the unauthorized activity, and the division engineer determines that the appeal has no merit, the responsible party remains subject to any civil, criminal, and administrative penalties as provided by law.

(c) *Tolling of statute of limitations.* Any person who appeals an approved JD associated with an unauthorized activity or applies for an after-the-fact permit, where the application is accepted and processed by the Corps, thereby agrees that the statute of limitations regarding any violation associated with that approved JD or application is tolled until one year after the final Corps decision, as defined at § 331.10. Moreover, the recipient of an approved JD associated with an unauthorized activity or applicant for an after-the-fact permit must also memorialize that agreement to toll the statute of limitations, by signing an agreement to that effect, in exchange for the Corps acceptance of the after-the-fact permit application, and/or any administrative appeal (See 33 CFR 326.3(e)(1)(v)). No administrative appeal associated with an unauthorized activity or after-the-fact permit application will be accepted until such signed tolling

agreement is furnished to the district engineer.

§ 331.12 Exhaustion of administrative remedies.

No affected party may file a legal action in the Federal courts based on a permit denial or a proffered permit until after a final Corps decision has been made and the appellant has exhausted all applicable administrative remedies under this part. The appellant is considered to have exhausted all administrative remedies when a final Corps permit decision is made in accordance with § 331.10.

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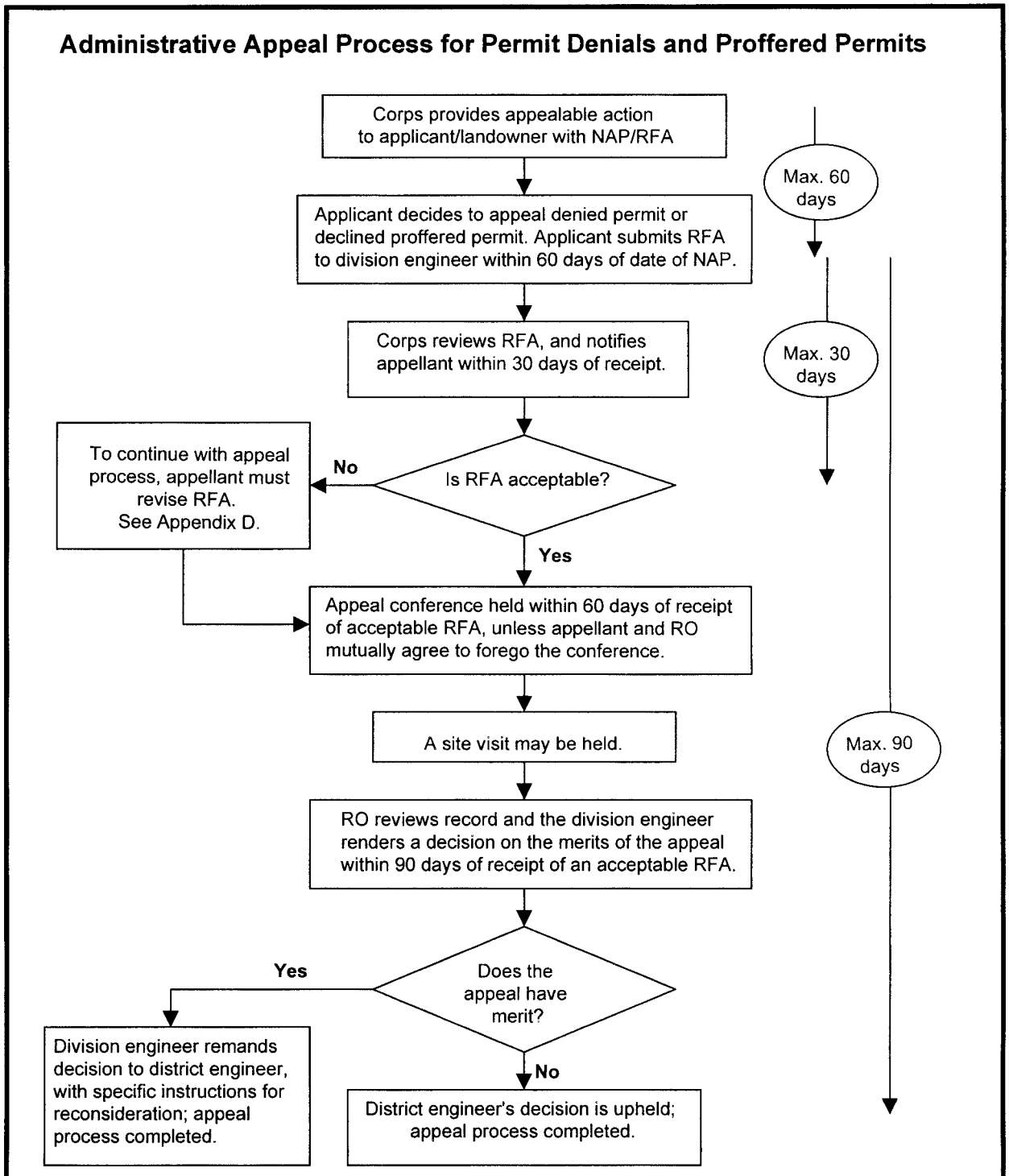
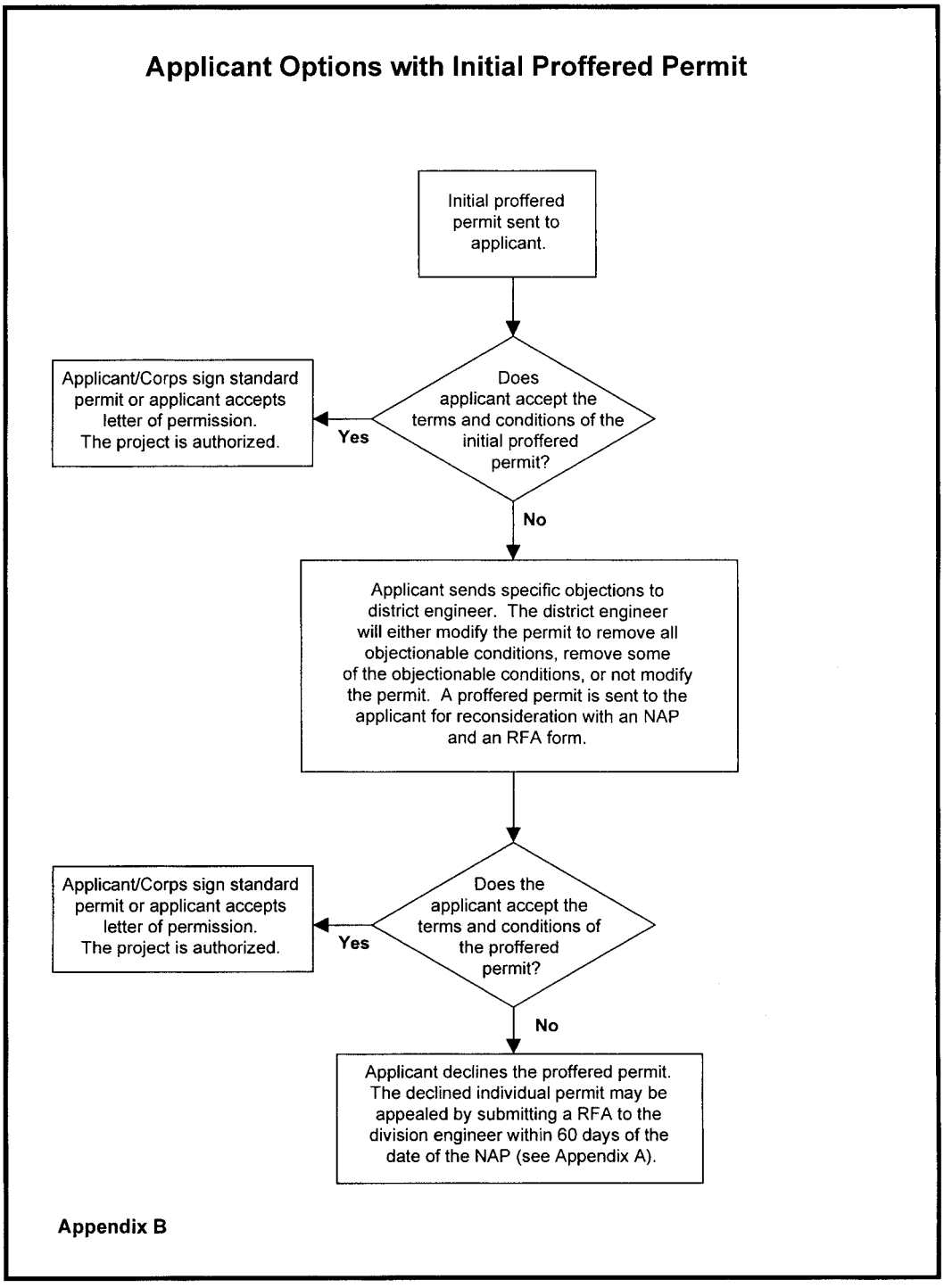
Appendix A to Part 331—Administrative Appeal Process for Permit Denials and Proffered Permits



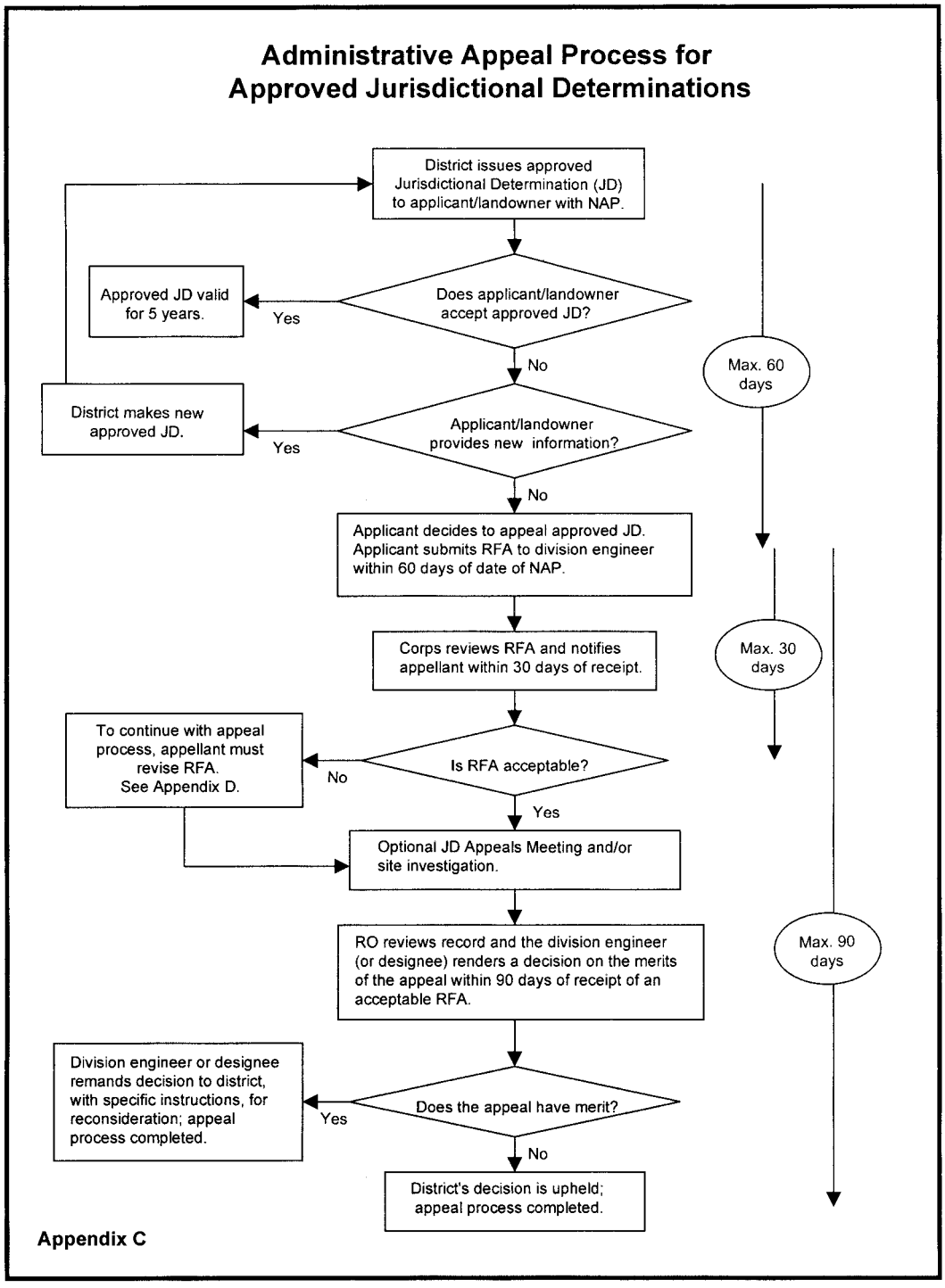
NOTE: If new information is provided to the Corps, the applicant will be asked if the applicant wishes to revise the project or record. If so, the appeal will be withdrawn and the case returned to the District for appropriate action. If not, then the Division Engineer will rule on the merits of the appeal based on the administrative record without consideration of the new information. However, the new information may cause the District Engineer to take action under 33 CFR 325.7, independent of the appeal process.

Appendix A

Appendix B to Part 331—Applicant Options With Initial Proffered Permit

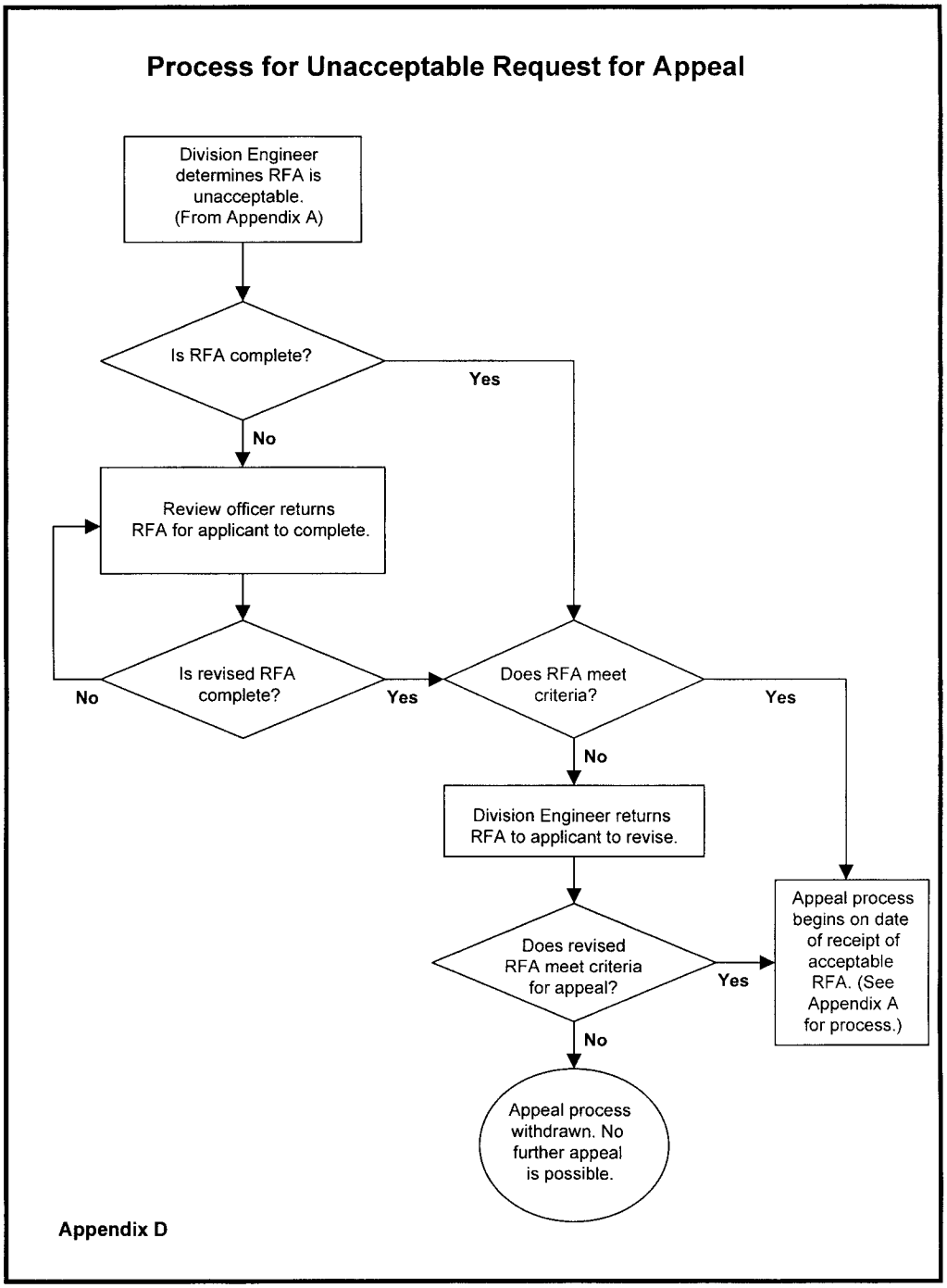


Appendix C to Part 331—Administrative Appeal Process for Approved Jurisdictional Determinations



Appendix C

Appendix D to Part 331—Process for Unacceptable Request for Appeal



[FR Doc. 00–7439 Filed 3–27–00; 8:45 am]

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Federal Register

Wednesday,

January 17, 2001

Part X

Department of Defense

Department of the Army, Corps of Engineers

33 CFR Part 323

Environmental Protection Agency

40 CFR Part 232

Further Revisions to the Clean Water Act Regulatory Definition of Discharge of Dredged Material; Final Rule

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 323

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 232

[FRL–6933–2]

Further Revisions to the Clean Water Act Regulatory Definition of ''Discharge of Dredged Material''

AGENCIES: Army Corps of Engineers, Department of the Army, DOD; and Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are promulgating a final rule to amend our Clean Water Act (CWA) section 404 regulations defining the term ''discharge of dredged material.'' Today's final action is being taken to follow-up on our earlier proposed rulemaking of August 16, 2000, in which we proposed to amend the regulations to establish a rebuttable presumption that mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. result in more than incidental fallback, and thus involve a regulable discharge of dredged material.

As a result of the comments we received, today's final rule reflects several modifications from the proposal. In response to concerns raised by some commenters that the proposal would have shifted the burden of proof to the regulated community as to what constitutes a regulable discharge, we have revised the language to make clear that this is not the case. Additionally, we received numerous comments requesting that we provide a definition of ''incidental fallback'' in the regulatory language. In response, today's final rule does contain such a definition, which is consistent with past preamble discussions of that issue and is drawn from language contained in the relevant court decisions describing that term. Today's final rule will both enhance protection of the Nation's aquatic resources, including wetlands, and provide increased certainty and predictability for the regulated community. At the same time, it continues to allow for case-by-case evaluations as to whether a regulable discharge of dredged material results from a particular activity, thus retaining necessary program flexibility to address the various fact-specific situations that are presented.

EFFECTIVE DATE: February 16, 2001.

FOR FURTHER INFORMATION CONTACT: For information on today's rule, contact either Mr. Mike Smith, U.S. Army Corps of Engineers, ATTN CECW–OR, 441 ''G'' Street, NW, Washington, DC 20314–1000, phone: (202) 761–4598, or Mr. John Lishman, U.S. Environmental Protection Agency, Office of Wetlands, Oceans and Watersheds (4502F), 1200 Pennsylvania Avenue N.W., Washington, DC 20460, phone: (202) 260–9180.

SUPPLEMENTARY INFORMATION:

I. Potentially Regulated Entities

Persons or entities that discharge material dredged or excavated from waters of the U.S. could be regulated by today's rule. The CWA generally prohibits the discharge of pollutants into waters of the U.S. without a permit issued by EPA or a State approved by EPA under section 402 of the Act, or, in the case of dredged or fill material, by the Corps or an approved State under section 404 of the Act. Today's rule addresses the CWA section 404 program's definition of ''discharge of dredged material,'' which is important for determining whether a particular discharge is subject to regulation under CWA section 404. Today's rule sets forth the agencies' expectations as to the types of activities that are likely to result in a discharge of dredged material subject to CWA section 404. Examples of entities potentially regulated include:

Category	Examples of potentially regulated entities
State/Tribal governments or instrumentalities	State/Tribal agencies or instrumentalities that discharge dredged material into waters of the U.S.
Local governments or instrumentalities	Local governments or instrumentalities that discharge dredged material into waters of the U.S.
Federal government agencies or instrumentalities	Federal government agencies or instrumentalities that discharge dredged material into waters of the U.S.
Industrial, commercial, or agricultural entities	Industrial, commercial, or agricultural entities that discharge dredged material into waters of the U.S.
Land developers and landowners	Land developers and landowners that discharge dredged material into waters of the U.S.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities that are likely to be regulated by this action. This table lists the types of entities that we are now aware of that could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your organization or its activities are regulated by this action, you should carefully examine EPA's applicability criteria in section 230.2 of Title 40 of the Code of Federal Regulations, the Corps regulations at part 323 of Title 33 of the Code of Federal Regulations, and the discussion in section II of today's preamble. If you have questions regarding the applicability of this action to a particular entity, consult one of the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Background

A. Plain Language

In compliance with President Clinton's June 1, 1998, Executive Memorandum on Plain Language in government writing, this preamble is written using plain language. Thus, the use of ''we'' in this action refers to EPA and the U.S. Army Corps of Engineers (Corps), and the use of ''you'' refers to the reader.

B. Overview of Previous Rulemaking Activities and Related Litigation

Section 404 of the CWA authorizes the Corps (or a State with an approved section 404 permitting program) to issue permits for the discharge of dredged or fill material into waters of the U.S. Two States (New Jersey and Michigan) have assumed the CWA section 404 permitting program. On August 25, 1993 (58 FR 45008), we issued a regulation (the ''Tulloch Rule'') that defined the

term ''discharge of dredged material'' as including ''any addition, including any redeposit, of dredged material, including excavated material, into waters of the U.S. which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation that destroys or degrades waters of the U.S.'' The American Mining Congress and several other trade associations challenged the revised definition of the term ''discharge of dredged material,'' and on January 23, 1997, the U.S. District Court for the District of Columbia ruled that the regulation exceeded our authority under the CWA because it impermissibly regulated ''incidental fallback'' of dredged material, and enjoined us from applying or enforcing the regulation. That ruling was affirmed on June 19, 1998, by the U.S. Court of Appeals for the District of Columbia Circuit. *Americian Mining Congress* v. *United States Army Corps of Engineers,* 951 F.Supp. 267 (D.D.C. 1997) (''*AMC*''); aff'd sub nom, *National Mining Association* v. *United States Army Corps of Engineers,* 145 F.3d 1339 (D.C.Cir. 1998) (''*NMA*'').

On May 10, 1999, we issued a final rule modifying our definition of ''discharge of dredged material'' in order to respond to the Court of Appeals' holding in *NMA,* and to ensure compliance with the District Court's injunction (64 FR 25120). That rule made those changes necessary to conform the regulations to the courts' decisions, primarily by modifying the definition of ''discharge of dredged material'' to expressly exclude regulation of ''incidental fallback.''

The *NMA* court did not find that all redeposits are unregulable, and recognized that redeposits at various distances from the point of removal are properly the subject of regulation under the CWA. As explained in the preamble to the May 10, 1999, rulemaking, our determination of whether a particular redeposit of dredged material in waters of the U.S. requires a section 404 permit would be done on a case-by-case basis, consistent with our CWA authorities and governing case law. The preamble to that rulemaking also described and summarized relevant case law (see 64 FR 25121), for example, noting that the *NMA* decision indicates incidental fallback ''. . . returns dredged material virtually to the spot from which it came'' (145 F.3d at 1403) and also describes incidental fallback as occurring ''when redeposit takes place in substantially the same spot as the initial removal.'' 145 F.3d at 1401. The *NMA* court also noted that ''incidental fallback'' occurs when a bucket used to excavate material from the bottom of a river, stream, or wetland is raised and soils or sediments fall from the bucket back into the water; the court further noted that ''fallback and other redeposits'' occur during mechanized landclearing, when bulldozers and loaders scrape or displace wetland soil as well as during ditching and channelization when draglines or backhoes are dragged through soils and sediments. 145 F.3d at 1403. The preamble also noted that the district court in *AMC* described incidental fallback as ''the incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or the back-spill that comes off a bucket and falls back into the same place from which it was removed.'' 951 F.Supp. at 270.

The *NMA* Court noted that the CWA ''sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other'' and that ''a reasoned attempt to draw such a line would merit considerable deference.'' (145 F.3d at 1405). The preamble to our May 10, 1999, rulemaking stated that we would be undertaking additional notice and comment rulemaking in furtherance of the CWA's objective to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters.''

Subsequent to our May 10, 1999, rulemaking the National Association of Homebuilders (NAHB) and others filed a motion with the district court that issued the *AMC* injunction to compel compliance with that injunction. The NAHB motion, among other things, asserted that the May 10, 1999, rule violated the court's injunction by asserting unqualified authority to regulate mechanized landclearing. A decision on that motion was still pending at the time we issued our August 16, 2000 proposal (65 FR 50108) to establish a rebuttable presumption that mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. will result in regulable discharges of dredged material.

As explained in the preamble, the proposed rule set forth:

* * * our expectation that, absent a demonstration to the contrary, the activities addressed in the proposed rule typically will result in more than incidental fallback and thus result in regulable redeposits of dredged material. It would not, however, establish a new formal process or new record keeping requirements, and Section 404 permitting and application requirements would continue to apply only to regulable discharges and not to incidental fallback.

65 FR 50113.

As with today's final rule, the proposal addressed only matters related to the ''discharge of dredged material'' under section 404 of the CWA. We note that other regulatory authorities may be applicable to activities in waters of the U.S., including stormwater permitting requirements under CWA section 402, and, in the case of ''navigable waters of the U.S.'' (so-called navigable in fact waters), section 10 of the Rivers and Harbors Act of 1899. Readers should refer to the preamble of the proposal for further information on those authorities (65 FR 50114).

The proposed rule had a 60 day comment period, which ended on October 16, 2000. While that public comment period was still open, on September 13, 2000, the district court denied NAHB's motion to compel compliance with the *AMC* injunction, finding that our earlier May 10, 1999, rule was consistent with its decision and injunction, and the decision of the D.C. Circuit in *NMA. American Mining Congress* v. *U.S. Army Corps of Engineers,* Civil Action No. 93–1754 SSH (D.D.C. September 13, 2000) (hereafter referred to as ''NAHB Motion Decision'').

In that decision the court found that, ''Inasmuch as this Court in *AMC,* and the Court of Appeals in *NMA,* invalidated the Tulloch Rule because it regulated incidental fallback, the Court's order enjoining the agencies from applying or enforcing the Tulloch Rule must be understood to bar the agencies from regulating incidental fallback.'' NAHB Motion Decision, slip op. at 8–9. The court then went on to determine that by making clear that the agencies may not exercise section 404 jurisdiction over redeposits of dredged material to the extent that the redeposits involve only incidental fallback, the May 10, 1999, rulemaking did not violate the court's injunction and is consistent with the decisions in *AMC* and *NMA.* Id. at 10–11.

C. Discussion of Final Rule

We received approximately 9,650 comments on the August 16, 2000, proposal (because the numbers given are rounded off, we refer to them as ''approximate.'') Approximately 9,500 were various types of individual or form letters from the general public expressing overall support for the rule or requesting it be strengthened. We received approximately 150 comments from various types of organizations, state or local agencies, or commercial entities, 75 of which provided detailed

comments, with approximately 50 of these expressing opposition to the rule. Organizations opposing the rule were primarily construction and development interests, mining and commerce interests, as well as local agencies or water districts with agricultural, flood control, or utility interests. These commenters often expressed the view that the proposal was inconsistent with the *AMC* and *NMA* opinions and the CWA. These comments also often expressed concern that the rebuttable presumption would be difficult or impossible to rebut and should be removed from the rule, and also frequently stated that a definition of incidental fallback was necessary, with many expressing preference for a ''brightline'' definition.

Organizations supporting the proposal or its strengthening included state and local natural resource and environmental protection agencies and environmental organizations. In addition, one detailed letter from a group of wetland scientists associated with a variety of institutions was received, and expressed support for the proposed rule and its strengthening. Commenters favoring the rule or its strengthening generally believed that the proposed rule's presumption that mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. result in more than incidental fallback, and thus involve a regulable discharge of dredged material, was appropriate. Many of these commenters, especially environmental organizations, requested that the rule be strengthened in a number of ways, particularly by identifying certain activities as always requiring a permit, and making clear that if chemical constituents are released into the water column or if material is moved in a way that permits its more ready erosion and movement downstream, a regulable discharge occurs. In addition, many of the commenters favoring the proposed rule or requesting that it be strengthened also expressed the view that it should define incidental fallback.

We have carefully considered all the comments received on the proposal in developing today's final rule. A detailed discussion of those comments and our responses is set out in section III of today's preamble.

Like the proposal, today's rule modifies our definition of ''discharge of dredged material'' in order to clarify what types of activities we believe are likely to result in regulable discharges. As described in the preamble to the proposed rule (65 FR 50111–50113), based on the nature of the equipment, we believe that the use of mechanized earth moving equipment to conduct landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. is likely to result in regulable discharges of dredged material.

However, in response to comments we received expressing concern that the proposal would result in a shift in the burden of proof and impose undue burdens on project proponents to ''prove a negative,'' we have made a number of changes to clarify that this is not our intent and will not be a result of this rule. Because these concerns primarily appeared to arise out of the proposed rule's use of a rebuttable presumption formulation, we have redrafted the rule language to eliminate use of a rebuttable presumption.

As we had explained in the proposed rule preamble, the proposal was intended to express our expectation that the activities in question typically result in regulable discharges, not to create a formal new process or record keeping requirements (65 FR 50113). The rule now provides that the agencies regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the U.S. as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback

By no longer employing a rebuttable presumption, we believe it is more evident that we are not creating a new process or altering existing burdens under the CWA to show a regulable discharge of dredged material has occurred. To make this point unmistakably clear, we also have added a new sentence to the rule language that expressly provides the rule does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA. In addition, the rule language has been clarified to make it more evident that we will not look to project proponents alone to provide information that only incidental fallback results. Thus, the rule language now refers to ''project-specific evidence show[ing] that the activity results in only incidental fallback.'' While this might consist in large part of information from project proponents, we also will look to all available information, such as that in agency project files or information gained from site visits, when determining if a discharge of dredged material results.

We also received a number of comments questioning how the presumption contained in the proposed rule might apply to particular equipment, or asserting that the presumption in the proposal was too broad. We thus are clarifying in the final rule language itself that we are addressing mechanized ''earth-moving'' equipment (*e.g.,* bulldozers, graders, backhoes, bucket dredges, and the like). Earth-moving equipment is designed to excavate or move about large volumes of earth, and we believe it is reasonable and appropriate for the agencies to view the use of such equipment in waters of the U.S. as resulting in a discharge of dredged material unless there is case specific information to the contrary. The administrative record of today's rule contains additional information on the nature of this equipment and its operation.

We received a large number of comments, both from those opposed to the proposed rule, as well as those supporting the proposal (or its strengthening), requesting us to provide a definition of ''incidental fallback.'' The proposed rule had not done so, instead providing preamble discussion of the relevant case law addressing that term, as well as referring readers to the preamble to our earlier May 10, 1999, rule (65 FR 50109–50110; 64 FR 25121). Subsequent to the proposal, as many of the commenters opposed to the proposal noted, the court, in its decision on the NAHB motion to compel compliance with the *AMC* court's injunction, cautioned against parsing the *AMC* and *NMA* language to render an overly narrow definition of incidental fallback. NAHB Motion Decision, slip opinion 12–14.

In light of numerous comments requesting that a definition of incidental fallback be included in the regulations, and consistent with our preamble discussions of relevant case law and the more recent discussion in the court's NAHB Motion Decision, we have provided a descriptive definition in the final rule. That language, which is based on the *AMC* and *NMA*, cases and the NAHB Motion Decision, provides that:

> Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

This language is fully consistent with the spirit and intent of those decisions. As noted in the *AMC* decision, incidental fallback involves ''incidental soil movement from excavation'' (951

F.Supp. 270); thus the definition in today's rule refers to the redeposit of small volumes of dredged material incidental to excavation activities. (See also *NMA,* 145 F.3d at 1404 (the statutory term ''addition'' does not cover the situation where material is removed ''and a small portion of it happens to fall back'')). The rule language refers to ''incidental fallback'' as returning dredged material to ''substantially the same place'' from which it came, a formulation consistent with the *AMC* and *NMA* decisions. AMC, 951 F.Supp. at 270; *NMA,* 145 F.3d. at 1403; see also, NAHB Motion Decision at 13. The examples of incidental fallback given in the rule's definition are drawn from the *AMC* decision. See, *AMC,* 951 F.Supp. at 270. We, therefore, believe the definition reflects an objective and good faith reading of the *AMC* and *NMA* decisions. See, NAHB Motion Decision, slip op. at 14.

We believe today's rule both ensures environmental protection consistent with CWA authorities and increases regulatory certainty in a manner fully consistent with the *AMC* and *NMA* decisions and the district court injunction. This has been accomplished through regulatory language that serves to put agency staff and the regulated community on notice that absent information to the contrary, it is our expectation that the use of mechanized earth moving equipment to conduct landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. is likely to result in discharges of dredged material. In addition, in response to comments, and in order to provide a descriptive standard of what constitutes non-regulable incidental fallback, we have provided in the rule a descriptive definition of that term which we believe to be fully consistent with an objective and good faith reading of the *AMC*, *NMA*, and NAHB Motion decisions.

At the same time, today's rule is not unnecessarily prescriptive and still allows for the case-by-case consideration of whether a discharge results. In making that determination, the agencies will consider any available information on project plan or design, as well as other information, such as site visits or field observations, during and after project execution. Information which we will consider includes that from project proponents, as well as other available information.

In determining if a regulable discharge of dredged material occurs, we will carefully evaluate whether there has been movement of dredged material away from the place of initial removal. In doing so, we will look to see if earth-moving equipment pushes or relocates dredged material beyond the place of excavation, as well as whether material is suspended or disturbed such that it is moved by currents and resettles beyond the place of initial removal in such volume as to constitute other than incidental fallback, and thus be a regulable discharge. See e.g., *United States* v. *M.C.C. of Florida,* 722 F.2d 1501 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part on remand, 848 F.2d 1133 (11th Cir. 1988) (resettling of material resulting from propeller rotation onto adjacent seagrass beds is jurisdictional). In appropriate situations, we also will include consideration of whether the operation results in the release of pollutants to the environment that were formerly physically or chemically bound up and sequestered from the environment prior to the dredging or excavation of the sediments. See e.g., *United States* v. *Deaton,* 209 F. 3d 331 (4th Cir. 2000) at 335–336 (discussing release of pollutants in determining sidecasting to be jurisdictional). In considering whether material is relocated, we will look at both horizontal and vertical relocation. For example, sidecasting, which involves horizontal relocation to the side of the ditch, is a regulable discharge. See e.g., *Deaton,* supra; NAHB Motion Decision at n. 3. Similarly, where activities involve the vertical relocation of the material, such as occurs in backfilling of trenches, a regulable discharge results. See e.g., (*United States* v. *Mango*, 997 F. Supp. 264, 285 (N.D.N.Y. 1998), affirmed in part, reversed in part on other grounds, 199 F.3d 85 (2d Cir. 1999); see, *Iroquois Gas Transmission System* v. *FERC*, 145 F.3d 398 at 402 (2nd Cir. 1998) (backfilling of trenches is jurisdictional).

We also will take into account the amount or volume of material that is redeposited. Incidental fallback at issue in *AMC* and *NMA* was the small-volume fallback from excavation. Similarly, today's rule defines incidental fallback as the ''small volumes of dredged material'' falling back to substantially the same place as the initial removal. Therefore, we will consider the volume redeposited in deciding whether the activity results in only incidental fallback.

Thus, the determination of whether an activity results in a regulable discharge of dredged material or produces only incidental fallback involves consideration of the location and the amount of the redeposit. Because of the fact-specific nature of the assessment of these factors, and their interrelated nature, we do not believe it to be feasible or appropriate to establish hard and fast cut-off points for each of these factors. Rather, the totality of the factors will be considered in each case.

Finally, we note that the proposed rule would have removed existing paragraph 3(iii) from the Corps' regulations at 33 CFR 323.2(d) and the counterpart EPA regulation at 40 CFR 232.2. Those paragraphs contained identical ''grandfather'' provisions for certain activities to be completed by August 24, 1995, and were proposed for deletion as being outdated. 65 FR 501211. Today's final rule, consistent with the original proposal, removes those paragraphs from the regulations.

III. Discussion of Comments

A. Legality of Proposal

1. Proposal as Inconsistent With NMA and Ruling on NAHB Motion to Compel

A number of commenters contended that the proposed rule conflicts with the rulings of the courts in *AMC*, *NMA*, and the NAHB Motion Decision. Among other things, they characterized the rule as an ''end-run'' around the nationwide injunction affirmed in *NMA;* ''an attempt to re-promulgate [the 1993 Tulloch Rule];'' and an effort to regulate the activities that the *NMA* court said were not regulable. In particular, these commenters characterized the *NMA* decision as holding that regulating any redeposit of dredged material during removal activities outruns the section 404 provisions of the CWA and that the agencies may only regulate activities that cause a net addition to waters of the U.S. They then argued that the rule is at odds with that holding. In addition, they asserted that the presumption would result in regulating effects as opposed to discharges and would make all excavation and landclearing activities regulated. Several commenters also noted that using a presumption does not address the *NMA* court's instruction that the agencies attempt to draw a bright line between what is a regulable redeposit versus non regulated incidental fallback.

As discussed in more detail in the sections below, we believe that the changes that we have made in today's rule address such concerns. Moreover, we do not agree with the legal analysis in many of the comments. In a number of respects, we believe the commenters have simply read the *NMA* decision too broadly. The court in *NMA* stated: ''[W]e do not hold that the Corps may not legally regulate some forms of redeposit under its section 404 permitting authority. We hold only that by asserting jurisdiction over 'any

redeposit,' including incidental fallback, the Tulloch Rule outruns the Corps' statutory authority.'' 145 F. 3d at 1405. Thus, the court explicitly recognized that some redeposits are regulable and indicated that the agencies' attempt to draw a line between incidental fallback and regulable redeposits would be entitled to deference. The court also acknowledged that sidecasting, the placement of removed soil in a wetland some distance from the point of removal, has always been regulated by the agencies; and finally, it recognized that removal of dirt and gravel from a streambed and its subsequent redeposit in the waterway after segregation of minerals constitutes an addition.

The court's acceptance of these principles undercuts the conclusion suggested by some that its statement that ''incidental fallback represents a net withdrawal, not an addition'' must be read to mean that activities that involve removal of material can never constitute a discharge. Similarly, the court's statement that ''Congress could not have contemplated that the attempted removal of 100 tons [of dredged spoil] could constitute an addition simply because only 99 tons were actually taken away'' must also be reconciled with the court's clear recognition that some redeposits constitute an addition.

In addition, the Court's NAHB Motion Decision supports the agencies' view that a more narrow reading of the *NMA* decision than some commenters are advocating is correct. The court stated:

> Inasmuch as this Court in *AMC,* and the Court of Appeals in *NMA,* invalidated the Tulloch Rule because it regulated incidental fallback, the Court's order enjoining the agencies from applying or enforcing the Tulloch Rule must be understood to bar the agencies from regulating incidental fallback [footnote omitted] * * * The May 10th Rule is facially consistent with the Court's injunction because it eliminates § 404 jurisdiction over incidental fallback, and removes the language asserting jurisdiction over ''any'' redeposit of dredged material. The rule makes clear that the agencies may not exercise § 404 jurisdiction over redeposits of dredged material *to the extent that the redeposits involve only incidental fallback* [citation omitted] (emphasis added).

Court's Denial of Motion to Compel, at 9–10.

Thus, the sweeping claims that ''any redeposit'' and all removal activities are beyond the scope of the CWA can not be substantiated based on *NMA* or other existing law. Today's rule provides a definition of ''incidental fallback'' that adheres to the judicial guidance provided in the *AMC* and *NMA* cases and the NAHB Motion Decision, while making clear to the public the types of activities that we believe are properly regulated.

a. *Excavation not covered.* The contention that excavation and other removal activities can never be regulated fails to recognize that ''discharges of pollutants'' can occur during removal activities even where the ultimate goal is withdrawal of material. That the CWA definition of ''pollutants'' does not include ''incidental fallback from dredging operations'' is of no significance, contrary to the suggestion of one commenter, because it does include ''dredged spoil.'' Several commenters referenced dictionary definitions of ''excavate'' and ''discharge'' to buttress their view that a removal activity can not involve a discharge. One commenter, in particular, argued that ''discharge'' denotes an intentional act, and that redeposits from excavation activity may not be regulated because they do not involve an intentional act. These definitions, however, do not indicate whether, in a given situation, pollutants were added to waters of the U.S. within the meaning of the CWA, the only issue we are concerned with here. First, as indicated in section III. A. 4 of this preamble, there is no support under the CWA for the position that a discharge must be an intentional act. In addition, as indicated in the preamble to the proposed rule, as a general matter, excavation and other earth-moving activities that are undertaken using mechanized earth-moving equipment typically result in the addition of a pollutant to navigable waters because the nature of such equipment is to move large volumes of material within and around the excavation site.

The court in *NMA* also recognized that redeposits associated with earth-moving activities could be regulated. (''But we do not hold that the Corps may not legally regulate some forms of redeposit under its section 404 permitting authority.'' 145 F. 3d at 1405.). As described in the preamble to the proposed rule, the machinery used for excavation, mechanized landclearing, and other removal activities generally results in substantial soil movement beyond the area from which the material is being removed (See also section III D of today's preamble). This substantial soil movement and distribution of material makes the situations involving mechanized earth-moving equipment akin to the numerous cases in which the courts have found that the redeposit of material constituted the discharge of a pollutant. See e.g., *Avoyelles Sportsmen's League* v. *Marsh*, 715 F. 2d 897, 923 (5th Cir. 1983)(recognized that the term ''discharge'' covers the redepositing of materials taken from wetlands); *United States* v. *Mango*, 997 F. Supp. 264, 285 (N.D.N.Y. 1998), *affirmed in part, reversed in part on other grounds*, 199 F. 3d 85 (2d Cir. 1999)(found that backfilling of trenches with excavated material was a discharge); *United States* v. *M.C.C. of Florida, Inc.,* 772 F. 2d 1501 (11th Cir. 1985)(holding that redeposition of seabed materials resulting from propeller rotation onto adjacent sea grass beds was an ''addition'' of dredged spoil); *Slinger Drainage Inc.*, CWA Appeal No. 98–10 (EPA Environmental Appeals Board Decision (EAB)(holding that backfilling by a Hoes trenching machine is a regulable discharge of dredged material, not incidental fallback)(appeal pending); *United States* v. *Deaton*, 209 F. 3d 331 (4th Cir. 2000)(holding that sidecasting is a regulated discharge); *see also United States* v. *Huebner*, 752 F. 2d 1235 (7th Cir.), *cert denied,* 474 U.S. 817 (1985) (sidecasting materials along a ditch and then using a bulldozer to spread material over several acres constituted a discharge of dredged material).

We do recognize, however, that some excavation activities by using specialized techniques or precautions may be conducted in such a manner that no discharge of dredged material in fact occurs. Today's rule specifically provides for consideration of project-specific information as to whether only incidental fallback results in determining jurisdiction under section 404. For example, we acknowledge that some suction dredging operations can be conducted in such a manner that if the excavated material is pumped to an upland location or other container outside waters of the U.S. and the mechanized removal activity takes place without re-suspending and relocating sediment downstream, then such operations generally would not be regulated. Other examples of activities that would generally not be regulated include discing, harrowing, and harvesting where soil is stirred, cut, or turned over to prepare for planting of crops. These practices involve only minor redistribution of soil, rock, sand, or other surface materials. The use of K–G blades and other forms of vegetation cutting such as bush hogging or mowing that cut vegetation above the soil line do not involve a discharge of dredged material.

b. *Too narrow reading of ''incidental fallback''.* Several commenters incorrectly equate ''incidental fallback'' with all dredged spoil that is redeposited in regulated waters as a result of activities using mechanized

equipment. As indicated, the *NMA* court made it clear that regulable redeposits could be associated with such activities and, to the extent that they were, the *NMA* decision did not preclude regulation. Today's rule explicitly excludes incidental fallback from the definition of discharge of dredged material. First, it does not alter the May 10, 1999, amendment to the definition of ''discharge of dredged material,'' which explicitly excluded incidental fallback from the definition. In addition, today's rule provides for the consideration of project-specific evidence which shows that only incidental fallback results from the activity. Thus, we have taken the necessary steps to ensure that we do not regulate ''incidental fallback'' when it is the only material redeposited during certain removal activities. The Court's NAHB Motion Decision found our May 10, 1999, amendment consistent with the injunction in the NMA case, and today's rule does not change or alter the underlying provisions of that rule.

Nevertheless, several commenters have argued that the agencies are interpreting ''incidental fallback'' too narrowly and have not heeded language in the Court's NAHB Motion Decision that cautioned against applying a too narrow definition of incidental fallback that would be inconsistent with an objective and good faith reading of the *AMC* and *NMA* decisions. Today's rule, however, is entirely consistent with that order and the decisions in *AMC* and *NMA*. First, commenters are incorrect that we have construed the meaning of ''incidental fallback'' too narrowly because, in formulating the definition in today's regulation, we were guided by the descriptions of incidental fallback in the judicial opinions. The *NMA* decision indicates that incidental fallback '' * * * returns dredged material virtually to the spot from which it came.'' 145 F. 3d at 1403. It also describes incidental fallback as occurring ''when redeposit takes place in substantially the same spot as the initial removal.'' 145 F. 3d at 1401. Similarly, the District Court described incidental fallback as ''the incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or the back-spill that comes off a bucket and falls back into the same place from which it was removed.'' 951 F. Supp. at 270. We believe that adopting a definition that relies heavily on the judicial formulations of ''incidental fallback'' will ensure consistency with those opinions as well as help project proponents understand the agencies' view of ''incidental fallback.'' We disagree strongly with commenters who suggested that we are trying to inappropriately parse the language of the *AMC* and *NMA* decisions, and believe that our definition of ''incidental fallback'' is based upon a good faith interpretation of those rulings. See section II C of today's preamble for additional discussion of this issue.

Nevertheless, as discussed in section III E of today's preamble, we did not adopt a definition of incidental fallback that would turn on whether the material was redeposited to ''the same general area'' from which it was removed. We believe this formulation could potentially be read to mean that incidental fallback would include any dredged material redeposited in the same overall site where excavation occurred, as opposed to the place of initial removal. We believe such a broad formulation would not adequately recognize court decisions that have found a regulable discharge where redeposits have occurred even though only a short distance from the removal point. *See, e.g., Deaton, Mango, etc.*

Moreover, contrary to one commenter's contentions, today's rule is not inconsistent with the approach taken by the agencies in the 1997 Tulloch Guidance (''*Corps of Engineers/Environmental Protection Agency Guidance Regarding Regulation of Certain Activities in Light of American Mining Congress* v. *Corps of Engineers*,'' April 11, 1997) (''1997 Guidance''). The commenter pointed to language in the 1997 Guidance stating that if there is ''movement of substantial amounts of dredged material from one location to another in waters of the United States (*i.e.*, the material does not merely fall back at the point of excavation), then the regulation of that activity is not affected by the Court's decision.'' Pointing to that language, the commenter went on to assert the 1997 Guidance meant that unless ''substantial amounts'' of dredged material were moved, then no discharge occurs, and concluded from this that the proposed rule was inconsistent with the 1997 Guidance. In response, we do not believe the 1997 Guidance can be properly read to support the commenter's conclusions. The language quoted by the commenter comes from a portion of the guidance under the section header ''Types of Discharge Not Addressed by Court Decision.'' In addition, it simply provides guidance to field personnel that where an activity results in movement of substantial volumes of dredged material, regulation of the activity is unaffected by the court's decision. The 1997 Guidance thus does not mean we interpreted the *AMC* or *NMA* decisions to allow regulation only if relocation of substantial amounts of dredged material takes place. In fact, the 1997 Guidance provides at page 3 that: ''The Court's decision only has implications for a particular subset of discharges of dredged material, i.e., those activities where the only discharges to waters of the U.S. are the *relatively small volume discharges* described by the Court as ''incidental fallback * * *'' (emphasis added). Nothing in today's rule is inconsistent with the 1997 Guidance.

The preamble to the proposed rule clearly recognized that there can be situations where due to the nature of the equipment used and its method of operation, a redeposit may consist of material limited to ''incidental fallback.'' In addition, that preamble recognized (as do the regulations at 33 CFR 323.2(d)(2)(ii) and 40 CFR 232.2), for example, that the use of equipment to cut trees above the roots that does not disturb the root system would not involve a discharge. Moreover, as discussed in section II C of today's preamble, we have modified today's final rule to make it even more clear that project-specific information may be used to demonstrate that only ''incidental fallback'' will result. Despite the discussion in the proposed rule's preamble, some commenters contended that we were overreaching. We believe that the language changes reflected in today's rule as well as the discussion in today's preamble clarify that redeposits associated with the use of mechanized earth-moving equipment will only be regulated if more than incidental fallback is involved, while making clear our view that activities involving mechanized earth-moving equipment typically result in more than incidental fallback. Where the redeposits are limited to incidental fallback, they would not be regulated.

c. *Covers same activities as 1993 Tulloch Rule.* A number of commenters argued that the proposed rule was an improper attempt to circumvent the *NMA* decisions and reinstate the invalidated 1993 Tulloch Rule. They contended that the agencies relied on no new information in developing this rule and that large segments of the proposed rule appeared in, and were used to justify, the 1993 Rule. Moreover, as opposed to narrowing the definition of ''discharge of dredged material'' as instructed by the courts, several argued that the proposed rule simply swept in the same activities and created a vague and impossible standard for rebutting the presumption. Several asserted that the agencies made no attempt to create

a ''brightline'' distinction between incidental fallback and regulable redeposits as encouraged by the courts and instead, simply shifted the burden to the regulated community. The end result, they argued, would be that the agencies would regulate activities that are not appropriately within the scope of the CWA, because, among other reasons, people lack the resources, wherewithal, or information to rebut the presumption.

The changes that we have made in the rule language further clarify the distinctions between our approach today and the 1993 Tulloch Rule. We believe that today's rule reflects important differences with the 1993 Tulloch Rule that make our action consistent with the *NMA* rulings. First, as discussed previously in this preamble, today's amendments along with those made on May 10, 1999, explicitly and repeatedly exclude incidental fallback from the definition of ''discharge of dredged material.'' Today's rule also provides a descriptive definition of incidental fallback and explicitly indicates that project-specific evidence may be used to show that only incidental fallback will result from the activity. These provisions are a direct response to the *NMA* rulings and to the comments that we received. In contrast, the relevant sections of the 1993 Tulloch Rule included *any* redeposit, including redeposits consisting of only incidental fallback.

Similarly, contrary to the suggestion of one commenter, the rebuttable presumption would not have recast in different legal language the central hypothesis of the Tulloch Rule that every redeposit of dredged material was a discharge subject to regulation under section 404. The commenter referenced language from the 1993 Preamble stating that it is ''virtually impossible to conduct mechanized landclearing, ditching, channelization or excavation in waters of the United States without causing incidental redeposition of dredged material (however small or temporary) in the process.'' 58 FR at 45017. In contrast, the position that we are taking today does not cast the jurisdictional net so broadly. Both the rebuttable presumption in the proposal and today's rule are more narrow in scope because we are not regulating incidental fallback. As discussed in the previous paragraph, the regulations defining the discharge of dredged material were amended on May 10, 1999, to make clear that incidental fallback is not encompassed within that definition and today's rule does not alter that exclusion.

Second, some commenters claimed that the rebuttable presumption that was in the proposed rule is the same as the *de minimis* exception that was added to the regulations as part of the 1993 Tulloch Rule and continues to be a part of the definition of discharge of dredged material today. 33 CFR 323.2(d)(3); 40 CFR 232.2. We believe that this comment misunderstands the relationship between today's rule and the *de minimis* exception contained in the 1993 Tulloch Rule. We have not reopened in this rulemaking the *de minimis* exception from the 1993 rule, since that provision is irrelevant to determining whether an activity results in a discharge of dredged material. As promulgated in the 1993 rule, the *de minimis* exception provides that section 404 authorization is not required for the incidental addition of dredged material associated with an activity that would not destroy or degrade a water of the U.S. Under the 1993 rule, mechanized landclearing, ditching, channelization, or other excavation activity that results in a redeposit into waters of the U.S. were presumed to destroy or degrade waters of the U.S., unless the project proponent demonstrated prior to proceeding with the activity that it would not cause such effects. 33 CFR 323.2(d)(3); 40 CFR 232.2. Thus, the *de minimis* exception in the existing regulations and its associated presumption address the issue of whether otherwise regulable discharges are excluded from section 404 authorization because of minimal effects on the environment, and does not, as some commenters suggested, serve as a means of asserting authority over activities outside our jurisdiction based on the effects of activities.

By contrast, today's rule addresses the issue of whether a regulable discharge of dredged material is even involved. Today's rule does not eliminate the requirement for a ''discharge.'' Instead it reflects the agencies' view that regulable discharges generally are expected to occur when certain activities using mechanized earth-moving equipment are undertaken. The proposed rule described this view in terms of a presumption but allowed project proponents to demonstrate that their activities caused only incidental fallback, which is beyond section 404 jurisdiction. Today's rule does not use the words ''presumption'' or ''presume'' to avoid any misunderstanding that we are attempting to shift CWA burdens to the project proponent. If the activity involves only incidental fallback, it would not be regulated regardless of the level of associated environmental impact because the statutory prerequisite of a discharge has not occurred. Moreover, unlike the treatment of mechanized activities when attempting to qualify for the *de minimis* exception, neither the proposed nor final rules require that the project proponent affirmatively demonstrate to the agencies that no discharge will occur prior to proceeding with his activities. Thus, the *de minimis* exception and today's rule serve different purposes and operate differently within the context of the regulation and for that reason the *de minimis* exception was not reopened as part of this rulemaking.

In addition, one commenter charged that by adopting a rebuttable presumption similar to the one proposed in the 1992 proposal but that was dropped prior to final promulgation in 1993, the agencies make clear their intent to sweep into regulation specific activities rather than determine actual discharges. In response, we note that the 1992 proposal actually contained an irrebutable presumption that was more inclusive than what we promulgated in the 1993 Tulloch Rule and than either the proposed or final rules we are addressing today. In fact, contrary to the sentiment expressed in the comment, the allowance for project-specific evidence that the activity results in only incidental fallback reflects our effort to restrict regulation to only regulable discharges.

We do not believe that it is of any significance that there is overlap between the activities addressed by today's rule and the 1993 Tulloch Rule. The *NMA* court did not find that all activities potentially encompassed by that rule were beyond the scope of the CWA, but rather that incidental fallback was excluded. NAHB Motion Decision. Thus, it is no surprise that the two rules address some of the same activities.

d. *Improperly relies on an ''effects'' test.* Several commenters argued that the proposed rule improperly relies on the broad goals of the CWA and an ''effects test'' as the basis for establishing jurisdiction. They contended that this approach is inconsistent with the *NMA*-related decisions and with other cases addressing the basis for jurisdiction under the CWA. They stated further that the CWA was not intended to provide comprehensive protection for wetlands. We believe that the commenters misunderstood the purpose and effect of the proposal, as well as have misread the conclusions in the NAHB Motion Decision about an effects based test of jurisdiction.

First, the agencies agree that the CWA regulates ''discharges'' and today's rule

in no way establishes an effects-based test for asserting CWA jurisdiction. As was indicated in the proposal, the presence of a ''discharge'' of dredged or fill material into waters of the U.S. is a prerequisite to jurisdiction under section 404. The purpose of this rule is to provide further clarification of what constitutes a ''discharge of dredged material.'' As indicated, we regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the U.S. as resulting in a discharge of dredged material unless there is project-specific information to the contrary. Thus, although significant adverse environmental effects can result from activities undertaken using mechanized earth-moving equipment, the jurisdictional basis is the presence of regulable discharges.

To the extent these comments are addressing the *de minimis* exception contained in the 1993 rule, the comments are outside the scope of this rulemaking because we have not reconsidered that provision here. We note that the continued operation of this existing regulatory provision is consistent with *AMC* and *NMA.* The NAHB Motion Decision affirmatively rejected the position that ''the Court's injunction must be understood to bar application and enforcement of the effects-based test of jurisdiction * * * because the Court also rejected this component of the Tulloch Rule * * * [citation omitted.]'' The Court stated :

> The Court rejected this test because the agencies were using it to assert jurisdiction over otherwise non-regulable activities; the Court expressly did not determine whether the effects-based test of jurisdiction would be valid if applied to activities that otherwise come within the scope of the Act. [citation omitted] Thus, where the effects-based test is not applied to otherwise non-regulable activities under the Act (such as incidental fallback), the Court's injunction does not bar its application.

NAHB Motion Decision, n. 8. Likewise today's rule is not in conflict with the *Slinger* decision as asserted by one of the commenters. In *Slinger Drainage, Inc.,* EPA's Environmental Appeals Board affirmed EPA's general view that '' the pivotal consideration for purposes of deciding whether an individual activity is or is not subject to the section 404 permitting requirement is whether a discharge of dredged material takes place.'' *In re: Slinger Drainage, Inc.,* CWA Appeal No. 98–10 (September 29, 1999)(slip opinion), at 19. Notably, the EPA Environmental Appeals Board also stated in that opinion that the requirement for a discharge ''is not to say that the 'effects' of a particular activity are of no concern. In a broad sense effects are the driving force behind the entire regulatory scheme to protect wetlands.'' *Id.*

Finally, one commenter suggested that discussions in the proposed rule's preamble concerning the release of contaminants in the water column indicate that the agencies ''base their finding of jurisdiction on analysis of the effects of the mechanized landclearing, ditching, or other activity.'' This is incorrect. Rather than being regulated based on the effect on water quality, as discussed in section III D of today's preamble, the transport of dredged material downstream or the release of previously bound-up or sequestered pollutants (which are in and part of the dredged material) may constitute a discharge, not by virtue of associated environmental impacts, but by virtue of being added to a new location in waters of the U.S. In evaluating whether suspension or downstream transport results in a regulable discharge or only incidental fallback, we would consider the nature and amount of such suspension and transport.

e. *Inconsistency with District Court ''specified disposal site'' rationale.* Several commenters contended that today's rule ignores the *AMC* court's analysis of ''specified disposal sites.'' We do not see today's rule as inconsistent with this aspect of the court's decision. The court in *AMC* held that, even if the term ''addition of a pollutant'' were broad enough to cover incidental fallback, the language ''specified disposal sites'' in section 404(a) would have led the court to the same holding. Because today's rule does not regulate incidental fallback, it is entirely consistent with this aspect of the court's opinion. Moreover, the court's reasoning in *AMC* was that the 1993 rule effectively made all excavation sites into disposal sites, rendering the statutory language ''at specified disposal sites'' superfluous. Today's rule does not render the statutory language superfluous because we are only asserting jurisdiction over redeposits that occur outside the place of initial removal.

2. Proposal as Inconsistent With the CWA

Several other claims were made that today's rule is not consistent with the CWA. Those claims included several pronouncements that the CWA only regulates discharges and that the legislative history demonstrates that Congress did not intend the CWA to regulate minor discharges associated with dredging, mechanized landclearing, excavation, ditching, channelization, and other *de minimis* discharges. One commenter disagreed with the proposition that section 404(f)(2) supports the proposed rule because it reflects Congressional recognition that these activities result in discharges. This commenter cited an excerpt from the *NMA* court decision—that the court was ''reluctant to draw any inference [from section 404(f)] other than that Congress emphatically did not want the law to impede these bucolic pursuits''—to support his assertion. Moreover, one commenter argued that the lack of a specific reference to excavation activities in the CWA is further evidence that small-volume, incidental deposits accompanying landclearing and excavation activities were not intended to be covered under section 404. Several commenters also contended that the CWA does not require a person to make a prima facie showing that activities are exempt from regulation under the Act and the agencies can not administratively impose this requirement.

As discussed in section III A d, we recognize that the statute and legislative history require a discharge for the requirements of the CWA to apply. The definition of discharge of dredged material contained in today's rule is, therefore, grounded on the statutory term ''discharge of a pollutant'' contained in section 502(12) of the Act and relevant court decisions that have construed the discharge requirement. We think, however, that some commenters' assertion that legislative intent mandates a broad construction of the term ''incidental fallback'' finds no support either in section 502(12) (defining ''discharge of a pollutant'' to include ''*any* addition of *any* pollutant'' (emphasis added)) or section 404(f). We do not agree that the 1972 and 1977 legislative histories generally indicate that Congress did not intend to regulate minor discharges resulting from certain activities, including excavation. To the contrary, while Congress was focused on preserving the Corps' autonomy with respect to navigational dredging, it is clearly over-reading the history to suggest that other types of removal activities implicitly were contemplated and rejected by the choice of words such as ''discharge,'' ''pollutant,'' ''dredge spoil,'' or ''disposal sites,'' as one commenter suggested.

Moreover, the treatment of incidental discharges in the 1977 Act helps illustrate Congress' view of these types of discharges. The 404(f) exemption was necessary because Congress recognized that, absent an exemption, regulation of discharges ''incidental to'' certain

activities was encompassed within section 404 under certain circumstances. There is no support in the Act or legislative history for concluding that so-called ''minor'' discharges associated with excavation were intended by Congress to be categorically excluded from the Act. In fact, the very use of the word ''incidental'' in section 404(f)(2) suggests just the opposite. Incidental is defined as: ''1. being likely to ensue as a chance or minor consequence; 2. occurring merely by chance or without intention or calculation'' (Miriam-Webster's Collegiate Dictionary (10th Ed., 1998)); ''1. occurring or likely to occur as an unpredictable or minor accompaniment; 2. of a minor, casual, or subordinate nature'' (American Heritage Dictionary of the English Language; 4th Ed.); ''happening or likely to happen in an unplanned or subordinate conjunction with something else'' (Random House Dictionary of the English Language (2d Ed. 1987)). Thus, the use of the word ''incidental'' in section 404(f)(2) belies the notion that the Act mandates a broad interpretation of incidental fallback.

Senator Muskie, the sponsor of the 1977 CWA amendment, addressed the section 404(f) exemptions as follows:

> 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body. 3 A Legislative History of the Clean Water Act of 1977, 95th Cong., 2d Sess., Ser. No. 95–14 (1978), at 474.

Thus, the Legislative History does not support the commenters' point.

In addition, we have clarified the rule in response to commenters who argued that the proposal was at odds with the CWA because the Act does not specifically require a discharger to make a prima facie case that its activities are exempt from the permit requirements. The revised language in today's rule clarifies that we are not requiring that a project proponent make a prima facie case as to the absence of jurisdiction. Today's rule sets forth the agencies' view that the use of mechanized earth-moving equipment in waters of the U.S. results in a discharge of dredged material unless there is evidence that only incidental fallback results, but expressly provides that the rule does not shift any burdens in administrative or judicial proceedings. This is fully consistent with the Act. See section III B of today's preamble for further discussion.

Some commenters have argued that because the regulatory definition of discharge of dredged material is broad, the presumption is unreasonable and cannot be refuted. As indicated in section II C of today's preamble, we have removed the presumption language and added a descriptive definition of incidental fallback, and also have clarified that the regulation does not shift any burden in any administrative or judicial proceeding under the CWA. We believe the definition mirrors the reach of the statute as interpreted by the courts and, therefore, is not unreasonable. As discussed in section III 1 b, we recognize that there will be situations when the project-specific information indicates that only incidental fallback results from the activity and thus it would not be regulated.

3. Proposal as Misreading Applicable Case Law

A number of commenters claimed that we have misread and are misapplying many of the cases we cited in support of today's action. Most of these comments addressed our analysis of the cases relating to what is a regulable discharge. We do not believe that we are unfairly reading the major cases in this area.

From these cases, we know that the following factors are relevant to determining regulable redeposits: quantity of material redeposited (*Avoyelles* and *Slinger* involved substantial quantities of redeposition); nature and type of relocation (redeposits adjacent to the removal area or backfilling are generally regulated, see *Deaton, Mango, M.C.C. of Florida* and *Slinger*); redeposit after some processing of material (*Rybachek* v. *EPA,* 904 F.2d 1276 (9th Cir. 1990)). As discussed in section II C of today's preamble, an assessment of such factors from the relevant cases will assist in determining whether a regulable redeposit takes place. We believe that in most situations, when applying the factors reflected in the cases, earth-moving activities undertaken using mechanized earth-moving equipment result in a discharge. Today's rule reflects that view while allowing evidence that only incidental fallback will result from the activity to preclude regulation.

Several commenters noted distinguishing facts that they believe undermine our reliance on some of the cases we cited. For example, several commenters noted that *Avoyelles* addresses the ''discharge of fill material'' not the ''discharge of dredged material'' and stated that our reliance on that case is misplaced. However, *Avoyelles* addresses the issue of what is an ''*addition*,'' an analysis relevant for both the discharge of fill and the discharge of dredged material. Its conclusion that the redeposit of material constitutes a ''discharge'' thus is relevant to today's rule. Moreover, the court in *Deaton*, citing *Avoyelles* among other cases, noted that its understanding of the word ''addition'' as including redeposits was the same as nearly every other Circuit Court to consider the addition question. *Deaton* involved the ''discharge of dredged material;'' thus, we do not believe it is appropriate to reject *Avoyelles* because the court only expressly addressed how that activity involved a discharge of ''fill.''

Similar distinguishing facts or other purported problems were asserted with respect to other cases. For example, one commenter argued that we cited *Bay-Houston Towing Company* as if the court had ruled that ''temporary stockpiling of peat in a wetland is a regulable discharge.'' In fact, the parenthetical in the preamble for *Bay-Houston* accurately reflects the court's determination that the activities at issue were subject to regulation (''Spreading the sidecasted bog material from the side of the ditch into the bog for future harvest * * * involves relocating the bog materials * * * for a period of time varying from 'a few hours' to 'a few days' '' or more. * * * Thus, while there may be something a step further than 'incidental fallback' which would fall outside of the government's jurisdiction, Bay-Houston's harvesting activities are not it.'') *Bay-Houston Towing Company*, No. 98–73252 (E.D. Mich. 2000)(slip opinion) at 8—9. We believe that the cases that we referenced in the proposed and final rule preambles support our action.

Finally, one commenter argued that our discussion of the effects of toxic releases from redeposited material does not justify our attempt to regulate activities that are beyond the scope of the CWA. As we noted in our discussion of the comments concerning the use of an effects based test to establish jurisdiction (see section III A 1 d of today's preamble), today's rule does not attempt to regulate activities beyond the scope of the CWA or base our jurisdiction on effects. We are only asserting jurisdiction over redeposits of dredged material that meet the statutory requirement of a ''discharge.''

4. Proposal as Complying With Applicable Law

Several other commenters asserted their view that the proposal was

consistent with the court's decision in *NMA*. They noted that the proposal reflected the concept expressed in *AMC* and *NMA* of ''incidental fallback.'' They also noted that the proposal does not regulate incidental fallback, but rather other types of redeposits that exceed incidental fallback. These commenters pointed out that the *NMA* court explicitly declined to hold that the Corps may not legally regulate some forms of redeposit under section 404. For these reasons, the commenters stressed that the proposal fully complied with the *NMA* decision and nationwide injunction. As discussed in section II C of today's preamble, we agree that today's rule is consistent with *AMC* and *NMA* because, among other things, it retains the exclusion of incidental fallback from the definition of discharge of dredged material.

One commenter described the proposal as consistent with *NMA*, even though the proposal may regulate small or unintentional redeposits of dredged material. The commenter argued that *NMA* is misinterpreted when described as standing for the proposition that the word ''incidental'' in incidental fallback means that no regulable discharge results if only small amounts of material are moved, or material is moved simply as an unintentional consequence of other activity. The commenter stressed that the CWA prohibits the discharge of ''any pollutant'' not in accordance with a permit, not merely a specific quantity of pollutants. A focus on some concept of ''significant'' quantity of pollutants by weight, the commenter emphasized, makes no statutory or ecological sense because dredged spoil contains not only inert sediment but also small chemical constituents with potentially large environmental impacts. The commenter also noted that the CWA at no point suggests an added requirement that discharges be intentional.

We agree that neither *NMA* nor the CWA establishes a quantity threshold triggering the permit requirement, but instead regulate any addition of any pollutant which, in the case of dredged material, consists of the dirt, soil or rock that is dredged, including any biological or chemical constituents contained in the dirt, soil or rock. However, the amount of redeposit is a factor that we believe should be considered in determining if a redeposit constitutes more than incidental fallback. We note that under *AMC* and *NMA* incidental fallback involves small volume discharges returned to substantially the same place as the initial removal. We also agree that, under these decisions, incidental fallback does not extend to covering all material that may be incidentally redeposited in the course of excavation activities. Simply because a redeposit of dredged material may be unintended does not mean it is not a discharge, since the CWA requires a permit for *any* addition of a pollutant into waters of the U.S., regardless of the intent of discharger. The broad interpretation of *NMA* urged by other commenters would elevate intent to overarching status in discerning whether an addition has occurred, a result we do not believe appropriate or justified under the CWA scheme. This suggested interpretation would also blur any meaningful distinction between incidental fallback and regulable discharges because it would effectively remove the term ''fallback'' from EPA's regulation. In our view, to constitute ''incidental fallback,'' a redeposit logically must be both ''incidental'' (*i.e.,* a minor, subordinate consequence of an activity) and ''fallback'' (*i.e.,* in substantially the same place as the initial removal). Neither *AMC* nor *NMA* compels us to expand the concept of ''incidental fallback'' to include all ''incidental redeposits'' without regard to the volume or location of the redeposit, and we decline to do so for the reasons stated above.

A number of commenters suggested that the agencies should find guidance not only from the *AMC* and *NMA* decisions, but also from other court decisions discussing the discharge of dredged material. In particular, the commenters argued that the ''net addition'' approach in *NMA* has been explicitly rejected in *Deaton* and implicitly rejected by many others. Two commenters quoted *Deaton* to stress that: ''* * *[t]he idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant * * *'' and that ''[i]t is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state.'' 209 F.3d at 335–36. Based on *Deaton*, several commenters believed there is ample support for a rule considering the redeposit of dredged material outside the place of initial removal as constituting an addition of dredged material. The commenters also noted that such an approach is consistent with the numerous other courts that have concluded that moving around dredged material within the same water body requires a permit. *See, e.g., U.S.* v. *Brace*, 41 F. 3d 117, 122 (3d Cir.), *cert. denied*, 515 U.S. 1158 (1994) (Clearing, churning, mulching, leveling, grading, and landclearing of the formerly wooded and vegetated site was a discharge of a dredged spoil that under the specific facts did not qualify for the 404(f)(1) farming exemption); *United States* v. *Huebner*, 752 F. 2d 1235 (7th Cir.), *cert. denied*, 474 U.S. 817 (1985) (Sidecasting and use of a bulldozer to spread the material over several acres constituted the discharge of dredged material that was not exempt under 404(f)); *Weiszmann* v. *U.S. Army Corps of Engineers*, 526 F. 2d 1302, 1306 (5th Cir. 1976)(''Spill'' of sediment during dredging of canal was a discharge of a pollutant; court rejected the argument that a spill is not a ''discharge.'').

We agree that *Deaton* and the other cases cited offer additional support. *Deaton* provides helpful post-*NMA* insights into what is an ''addition'' of a pollutant, and we note that the NAHB Motion Decision rejected the idea that there is a conflict between *Deaton* and *NMA*. NAHB Motion Decision at 16. We believe today's rule is consistent with *Deaton*, *AMC*, and *NMA*, and complies fully with the injunction affecting the 1993 Tulloch Rule.

Numerous commenters looked to the CWA as a basis for concluding the proposal was consistent with Congressional intent and *NMA*. One commenter observed that numerous courts, including the U.S. Supreme Court, have looked to the underlying policies of the CWA when interpreting authority to protect wetlands. The commenter noted that the goal of the CWA is to maintain the ''chemical, physical, and biological integrity of the Nation's waters,'' and discussed the pollution and adverse effects to aquatic ecosystems caused by wetlands dredging and stream channelization. The commenter emphasized that it would frustrate the goal of the CWA to not regulate the incidental soil movements that occur during excavation. While we agree that regulation of discharges of dredged material into waters of the U.S. is a critical component of achieving CWA goals, consistent with *AMC* and *NMA*, CWA section 404 does not extend to incidental fallback, and today's rule has been drafted to ensure that we regulate only on the basis of the discharge of dredged material.

Some commenters suggested that today's rule also be guided by CWA section 404(f)(2) and its legislative history, which explicitly require the regulation of ''incidental'' discharges under certain circumstances even if they might otherwise be a result of a specially exempt category of activities. Most of these commenters concluded

that section 404(f)(2) reflects an explicit Congressional intent to regulate minor and unintentional soil movements that occur during the process of constructing a drainage ditch in wetlands or otherwise are incidental to an activity that ''impairs circulation and flow or reduces the reach'' of waters of the U.S. One commenter concluded that this section of CWA does not provide support for today's rule.

One commenter asserted that section 404(f)(2) conveys important Congressional intent regarding how the term ''discharge'' should be interpreted, despite the fact that the section does not define the term ''discharge.'' While agreeing with the District Court in *AMC* that the section does not use effects ''to regulate activities that do not themselves constitute discharges'' (951 F.Supp. 267, 275 n. 18), the commenter argued that section 404(f)(2) makes clear the proposition that: (1) At a minimum some category of ''incidental'' discharges are regulated by the CWA; (2) regulation under section 404(f)(2) does not depend on whether the ''incidental'' discharge itself has significant environmental effects but only on whether the activity, to which the discharge may be only ''incidental,'' has certain environmental effects; and (3) regulated ''incidental'' discharges can occur during the excavation or dredging process, because the language of the section about ''reducing the reach'' and ''impairing the flow'' commonly occur through excavation of drainage ditches.

One commenter suggested that language of section 404(f)(1) similarly supported the idea that a permit should generally be required for activities that drained wetlands. For example, the commenter noted section 404(f)(1)(a) provides an exemption for ''minor drainage'' associated with farming and silvicultural activity. If discharges from such activities trigger the provisions of section 404(f)(2), the commenter asserted, Congress intended ''minor drainage'' to be regulated. The commenter argued that the plain language in section 404(f)(1) provides guidance for interpreting the term ''discharge.'' Section 404(f)(1) states that ''the discharge of dredged or fill material'' resulting from these activities ''is not prohibited by or otherwise subject to regulation.'' In other words, the commenter emphasized, the identified activities that may result in a discharge of dredged or fill material ''are exempt from section 404 permit requirements'' (quoting Corps and EPA implementing regulations, 33 CFR 323.2; 40 CFR 232.3(c)); otherwise, there would be no need for the 404(f)(1) exemptions.

As discussed in section III A 2 above, today's rule is based on the definition of ''discharge of a pollutant'' contained in section 502 of the Act, as construed by the caselaw, including the *AMC* and *NMA* opinions finding that incidental fallback is not a regulable discharge under the Act. We agree that section 404(f), and in particular the use of the term ''incidental'' in section 404(f)(2) provides evidence supporting our rejection of some commenters' assertions that the Act restricts us to only regulating substantial or significant redeposits of dredged material.

B. Overall Reasonableness of Presumption

Many commenters expressed views on the overall reasonableness of the presumption contained in the proposed rule. Commenters maintaining that the presumption is reasonable stated that it would not expand the regulatory authority of the agencies or be contrary to relevant court decisions, but instead would clarify how that existing authority would apply. Others noted that the presumption is reasonable because it is consistent with their experience or Corps experience in evaluating discharges of dredged material. Numerous commenters affirmed the validity of the examples of activities in the preamble of the proposed rule that are presumed to result in a discharge of dredged material, including those who asserted that the presumption would decrease regulatory uncertainty as a consequence. These commenters also stated their view that other specific activities (*e.g.,* grading, leveling, bulldozing) and redeposits of sediment away from the point of excavation during ditching and channelization were regulable discharges.

One commenter indicated that the very nature of how some equipment operates means that it will always result in a discharge with more than incidental fallback. Another asserted that dredging or excavation activities conducted in a wetland or stream will always result in a regulable discharge. A number of commenters provided citations from the scientific literature in support of the presumption for these activities. Several commenters maintained that the presumption is reasonable because in any instance a person conducting such activities would be given the opportunity to demonstrate that only incidental fallback would result.

Today's rule reflects a reasonable belief that mechanized earth-moving equipment when used in waters of the U.S. typically will cause regulated discharges because they are made to move large amounts of earth and will typically relocate the dredged material beyond the place of initial removal. We also recognize, however, that the activities addressed in today's rule will not always result in a discharge, and therefore, the final rule allows the necessary flexibility for considering project-specific information that only incidental fallback results.

Other commenters maintained that the presumption was not reasonable, arguing that it was at odds with controlling legal precedent. These commenters argued that to establish a rebuttable presumption, case law requires us to have a record demonstrating that it is more likely than not that the presumed fact exists. See e.g., *National Mining Association* v. *Babbitt*, 172 F.3d 906 (D.C. Cir. 1999). Some commenters asserted that the presumption was unreasonable because it did not clearly articulate the scope of what is not regulated (*i.e.,* what is incidental fallback). Some commenters also maintained that the presumption was not reasonable because it would require a permit for all of the types of activities addressed in the rule, and would thus regulate dredging itself rather than the discharges that result. Some asserted that because the presumption is not always true, it is not reasonable. Other commenters asserted that the recognition in the proposed rule's preamble that specialized and sophisticated techniques and machinery may limit redeposits to incidental fallback undercuts the proposed rule's presumption. One commenter likened the presumption in the proposed rule to the agencies presuming that all land was jurisdictional under section 404 of the CWA and then taking enforcement action based on that presumption without establishing that the agencies had jurisdiction. Another comment asserted that no technical analysis was offered to support the proposed rule's presumption.

As previously discussed in section II C of today's preamble, the final rule does not establish a rebuttable presumption. Therefore, commenters' arguments about not meeting the legal prerequisites for establishing a rebuttable presumption in the legal sense are not relevant to the final rule. Instead of a rebuttable presumption, the rule states our view that we will regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the U.S. as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental

fallback. In addition, in response to comments that we received, we have included in the final rule a descriptive definition of ''incidental fallback.''

As today's rule expressly provides that it does not shift any burden in CWA judicial or administrative proceedings, we do not agree that the rule has the effect of simply presuming jurisdiction, as the burden to show that a regulable discharge occurs has not been altered. Further, because we do not use a rebuttable presumption in today's final rule, the legal standards under the caselaw for judging the adequacy of an agency's record to justify a rebuttable presumption are not relevant to this rule. We also do not agree that today's rule results in a permit being required in every circumstance in which the activities listed occur. Today's rule continues to expressly provide that incidental fallback is not a regulable discharge, and also provides for project-specific consideration of whether only incidental fallback results from the activities addressed by the rule. We believe that the modified regulatory language provides a measure of regulatory certainty as to the types of activities that are likely to result in a regulable discharge, while preserving necessary flexibility to address the specific circumstances of a given project.

We also believe that allowing for project-specific information that the activity is conducted in a manner that results in only incidental fallback is indicative of that flexibility, rather than undercutting the validity of our general view. With respect to consistency with legal precedent and the CWA, we have addressed such issues elsewhere in the preamble, primarily in sections II C and III A.

Today's regulation is based on the nature of earth-moving equipment (*i.e.*, machines that move the earth). Contrary to the assertion that no technical analysis was provided, the preamble to the proposed rule, as well as materials in the rule's record, do provide technical information supporting the reasonableness of the final rule. We also believe the rule is reasonable in that it helps ensure that activities resulting in discharges meant to be addressed by the CWA are in fact regulated. Moreover, the rule's explicit opportunity to consider project-specific evidence to the contrary, and express recognition that it does not shift any burden in any administrative or judicial proceeding under the CWA, ensures that activities outside our jurisdiction are not regulated.

One commenter contended that excavation activities result in environmental benefits, providing an example that the size of certain unnamed drainages underwent a net expansion as the result of excavation at mine sites. Another comment asserted that the presumption was not reasonable because during the interval between the court decision and the publication of the proposed rule, the Corps, according to the commenter, had implicitly or explicitly acknowledged circumstances where excavation activities could be undertaken without a discharge requiring a section 404 permit.

Whether or not one agrees that certain excavation activities result in a net expansion of waters or net benefit to the aquatic environment does not bear upon the issue of whether such activities produce regulable discharges. Many restoration activities and other environmentally beneficial efforts necessitate discharges into waters of the U.S., a number of which are provided authorization under Nationwide General Permits.

A number of commenters requested clarification of, or objected to, the rebuttal process due to vagueness. These commenters sought further specifics as to the type of information that could be used to rebut the presumption and the standard of proof. In addition, they expressed concern that it would be difficult or impractical to rebut the presumption contained in the proposed rule. These commenters were concerned that the proposal placed an unfair burden on the landowner by requiring the applicant to prove a standardless proposition or not rebut the presumption and risk enforcement. These commenters believed it would be difficult to present a valid case because the proposal did not establish a set of clearly defined criteria for rebutting the presumption of discharge; some said that the rule seemed to require that a party undertake the activity with its inherent enforcement risks in order to provide evidence to rebut the presumption; others argued that the description of a regulable discharge is so broad that the presumption can not be rebutted. Others expressed concern that any effort to rebut the presumption would be extremely time-consuming, confusing, technically challenging and cost prohibitive. Other commenters expressed the view that the rule unfairly placed the burden of determining jurisdiction on the regulated community, a burden that should be borne by the government instead.

As noted in the proposed rule preamble, the proposal expressed:

> * * * our expectation that, absent a demonstration to the contrary, the activities addressed in the proposed rule typically will result in more than incidental fallback and thus result in regulable redeposits of dredged material. It would not, however, establish a new formal process or new record keeping requirements, and Section 404 permitting and application requirements would continue to apply only to regulable discharges and not to incidental fallback.

65 FR 50113.

The proposal would not have required project proponents or landowners to ''prove a negative'' or shift the burden of proof as to CWA jurisdiction from the government to the regulated community and the final rule clarifies our intent in this regard. As we have discussed in section II C of today's preamble, in light of comments received, we have revised the rule to make clear that it does not shift the burden of showing that a regulable discharge has occurred under the CWA, and also have included a descriptive definition of non-regulable incidental fallback in order to help provide a standard against which to judge regulable versus non-regulable redeposits. As a result, we do not believe the final rule somehow establishes or requires a time-consuming or expensive rebuttal process. Instead, it provides clarification to those who have unwittingly misread the *NMA* case to preclude regulation of all removal activities in waters of the United States. Issues related to the types of relevant information we will consider in determining if a regulable discharge has occurred are addressed in section II C of today's preamble.

Other commenters felt the proposed rule's presumption was unreasonable in light of the exclusion provided for ''normal dredging operations.'' As in the original August 25, 1993, Tulloch Rule, several commenters suggested that all discharges of dredged material should be regulated, stating that it does not seem reasonable or consistent to exclude discharges incidental to ''normal dredging operations'' for navigation, while regulating excavation for non-navigation purposes.

In response we note that today's rule does not modify in any respect the provisions of the 1993 rule related to normal dredging operations, and we have not reopened any of these provisions in this rulemaking. The rationale for the normal dredging operation provisions was explained in the August 25, 1993 rulemaking (58 FR 45025–45026), and interested readers are referred to that discussion for further details.

C. Reasonableness of rule as to specific activities

Commenters cited a number of circumstances or scenarios that may or may not result in a regulable discharge. As a general matter, there was not sufficient information provided in the comments to provide a case-specific response. The discussion below is not intended to be definitive, as an actual decision about whether a particular activity results in a discharge needs to be made on a case-by-case basis considering actual evidence of the particular activity in question. Literature citations and other information that such commenters provided have been added to the record for the rule.

We received several comments regarding mining practices. One stated that for mining-related activities, they were unable to name examples of any equipment used that was not included on the proposed rule's referenced list as falling within the rebuttable presumption. Therefore, according to the commenter, the presumption had the effect of precluding ''per se'' all mining related activities performed with mechanized equipment in jurisdictional areas in contravention of the *AMC* and *NMA* decisions. Another asserted that under the proposed definition, most placer mines, suction dredges, and exploration trenches would be required to obtain an individual section 404 permit. As discussed in section II C of today's preamble, the final rule does not establish a rebuttable presumption, and provides for consideration of project-specific information to determine if a discharge results. We thus do not believe that today's rule has the effect of ''per se'' precluding or regulating all activities conducted with mining equipment in waters of the U.S. For example, as noted in section III A 1 a of today's preamble, some suction dredging can be conducted in such a way as not to produce a regulable discharge.

Several commenters raised scenarios involving in-stream mining or other mechanized activities in dry, intermittent streambeds, particularly of the kind that may occur in arid regions of the country. One stated that excavation activities in arid regions would not result in the ''parade of horribles'' that the agencies presume result from excavation. One commenter put forward two specific scenarios of in-stream mining activities that he believed were not covered as regulated discharges. They were the use of a front-end loader to scoop out material from a dry, intermittent stream up against the stream bank or other face, and the use of a scraper to move material out of the dry stream. Some commenters contended that such activities are conducted with little or no sediment redeposition, stating they do not involve the uprooting of vegetation and are undertaken when the stream bed is completely dry after winter flow ends and before the threat of the first flow in the next winter. Other comments stated that it was necessary to recognize that the southwest is different from the east where ''real wetlands'' exist, contending that, in the west, wetlands for the most part are only wetlands because the government says they are. The commenters believed that one rule should not apply to all, and that the vast majority of the drainages located in the southwest are in arid climates, which in many instances involve nothing more than isolated ephemeral streams, or dry washes with very little if any aquatic resources and with flows that occur only in response to infrequent rains and effluent from stormwater discharge. Still other comments focused on flood control maintenance activities where they asserted the disturbances are minimal and include only minor water quality impacts such as deposit and removal of sediments to maintain flow conveyance. They stated their activities are typically performed in a dry riverbed or channel, where there are no aquatic resources, the material in the channel is primarily sand and gravel, and the potential for downstream impacts are minimal.

We acknowledge that the presence or absence of water in a jurisdictional stream or other jurisdictional area is a project-specific fact that would need to be considered in deciding whether an activity results in only incidental fallback or a regulable discharge. While we agree that the presence or absence of water is relevant to determining whether a discharge has occurred due to suspension and transport of material to a new location, regulable discharges can still occur in a dry streambed when mechanized equipment is used to push materials from one area of jurisdictional water to another. Discharges can also occur when material is deposited in such a way as to cause materials to slide back into the jurisdictional area.

Several commenters contended that by establishing a rebuttable presumption that mechanized landclearing produces more than incidental fallback, the proposed rule would have resulted in undue hardship by subjecting them to environmental review. They believe that the stated rationale for the agencies' proposed presumption with respect to mechanized landclearing fails to consider the clearly ''incidental'' nature of any soil movement associated with such activity. Another commenter maintained that landclearing activities, such as grubbing and raking with a small D–7 Caterpillar bulldozer, along with a K–G blade and a root rake, can be conducted so that the only soil displaced during a landclearing would be that which would ''stick to and sometimes fall off the tracks of the bulldozer,'' or would be ''scraped off the blade,'' or would be ''pushed up by [a] stump or stuck to [a] stump or its root mass as it was knocked over and pulled from the ground.'' This commenter also maintained that the agencies were well aware of such landclearing techniques and should acknowledge that they do not produce regulable discharges.

In response, we first note that the final rule has eliminated the use of a rebuttable presumption. As stated elsewhere in today's preamble, the use of mechanized earth-moving equipment to conduct landclearing, because it typically involves movement of soils around a site, would typically involve more than incidental fallback. It is difficult to give generalized conclusions regarding specific subcategories of activities or practices, particularly where the description of the activities lacks detail. Whether a particular activity results in a discharge, or only incidental fallback, necessarily depends upon the particular circumstances of how that activity is conducted, and as a result, today's final rule allows for project-specific considerations. We also note that in the NAHB Motion Decision, the Court declined to decide, on a general level, that the displacing of soils, sediments, debris, or vegetation incidental to the use of root rakes and excavating root systems or knocking down or uplifting trees and stumps to be non-regulable under section 404. NAHB Motion Decision at 15. Whether or not these types of activities are conducted so as to avoid a regulable discharge depends upon project-specific considerations, which today's final rule provides for. See also section III A 1 of today's preamble for further discussion of certain activities, such as use of K–G blades.

Numerous commenters suggested that a backhoe was the classic example of how digging could be done with no more than incidental fallback. They believed that one-motion excavation, such as excavation with a conventional hydraulic-armed bucket (*e.g.,* trackhoe or backhoe), can be easily accomplished with only incidental fallback resulting. They contended that the small amount of material that falls from the bucket is,

by definition, incidental to the operation of the bucket and the excavation and that no dredged material is introduced into the jurisdictional area, meaning a regulable discharge has not occurred. In summary, they believed that the proposed rule was too inclusive and should explicitly exclude certain types of excavation from the presumption of discharge.

The preamble to today's rule clearly recognizes that there are situations where, due to the nature of the equipment used and its method of operation, a redeposit may be limited to ''incidental fallback.'' As emphasized repeatedly, today's rule would continue to exclude incidental fallback from regulation under section 404. We note, however, that backhoes by their nature (i.e., the size of the excavation machinery) are typically used to move more than small volumes of material in the course of excavation, and are thus likely to result in redeposits that exceed the definition of incidental fallback (*i.e.,* ''*small volumes* of dredged material * * * [that] * * * falls back to *substantially the same place* as the initial removal.'') However, the rule allows for project-specific evaluation of whether only incidental fallback occurs, and the definition of incidental fallback includes as an example ''the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.''

One commenter suggested that discing is not excavation, since there is no removal, but merely minor displacement. They believed that the proposed rulemaking suggests that disking results in more than incidental fallback, and they question how there can be any fallback of any nature where there is no excavation. Another commenter challenged the reasonableness of the presumption, because not all mechanized activities first ''remove'' material from waters of the U.S. and therefore such activities could not result in material being redeposited.

We acknowledge that there are mechanized activities that do not first excavate or remove material and therefore redepositional discharges do not occur (*e.g.,* the driving of piles in many circumstances). However, we also note that by pushing or redistributing soil, activities other than excavation can result in the addition of dredged material to a new location, and hence produce a regulable discharge.

Several commenters discussed the routine operation and maintenance of numerous existing flood control channels, levees and detention basins. They stated that existing facilities are vital to tax-paying citizens since they are critically needed to protect their health and safety. They also stated the intent of a flood control excavation project is to maintain hydraulic capacity and entirely remove accumulated sediment and debris from the facility, restoring it to its original lines and grades. They contended that the implementation of existing maintenance-related Best Management Practices addresses negative impacts of this work. Additionally they asserted that, under current regulation, no permit is required for excavation, the work can proceed in a timely manner, and costly submittals are not needed. They also contended that their ''finished products'' enhance, protect and maintain water quality. The commenters were concerned that all of their excavation projects under the proposed rule would be presumed to include an ''addition'' of pollutants.

One commenter, on behalf of a water authority, stated that they frequently engage in a number of activities subject to section 404 of the CWA, and which typically fall under the Nationwide permit program. Such activities include the construction of erosion control structures, channelization for temporary water diversions during construction of facilities, and building pipelines that infrequently occur in waters of the U.S. They stated that their efforts to enhance and restore wetlands often require mechanized landclearing to remove non-native, invasive vegetation. They asserted that, if implemented, the proposed revision would inappropriately deem these activities regulable discharges, when in fact they do not involve discharges beyond incidental fallback. Another commenter stated that they have restored several lakes, ponds, and sediment in streams with the one-step removal process under the Tulloch Rule. They utilize specialized low ground pressure equipment, to provide one step removal of accumulated sediments in a low impact manner to restore lakes, ponds, and streams. They also assert that they are very conscientious to prevent any fall back or otherwise discharges of materials into any waters of the U.S. and that they have very successfully restored many acres of U.S. waters, restoring aquatic habitat and navigability, and property values throughout their particular region of the U.S. They believed a distinction needs to be made between restoration activities to remove sediment from smothered aquatic habitats and draining jurisdictional areas to convert waters of the U.S. to upland uses.

In response, we note that some of the routine discharges from operation and maintenance of existing flood control channels, levees and detention basins are exempt from regulation under CWA section 404(f), and the exemption is not affected by this rule. Also, Corps Nationwide and Regional General Permits authorize some of the routine operation and maintenance work. We also note today's rule does not establish new requirements or procedures, and thus does not necessitate costly new submittals. Additionally, today's rule no longer establishes a rebuttable presumption, and project-specific information will be considered in determining whether an activity results in more than incidental fallback. If, as some of these commenters assert, their activities do not result in more than incidental fallback, then they would not be regulated under the CWA, nor are they currently regulated. We also note that because the determination of jurisdiction rests on the presence of a discharge of dredged material, which is not dependent upon either the effects of the activity or the intent of the person, the fact that an activity may or may not be beneficial, or is undertaken with the intent to remove material, does not form the basis for determining jurisdiction.

One commenter was concerned that the proposed rule's presumption would seriously impede the ability of water users to maintain their diversion structures, irrigation ditches, retaining ponds and reservoirs. In light of the fact that the term ''waters of the U.S.'' determines the extent of the Corps jurisdiction under the CWA, they believed that the proposed rule would subject even the most routine maintenance of ditches, headgates and off-channel storage facilities to the permitting process and that resulting delays would hamper the efficient operation of water delivery systems, and jeopardize safety as well.

Today's final rule does not establish a rebuttable presumption, and as discussed in section II C and III A of today's preamble, would not result in the regulation of incidental fallback. We also note that because the determination of jurisdiction rests on the presence of a discharge of dredged material, which is not dependent upon the effects of the activity, the fact that an activity may or may not be beneficial does not form the basis for determining jurisdiction.

D. Regulation on Basis of Toxics/ Pollutant Releases

A number of commenters from the science profession provided extensive

discussion regarding the discharge of pollutants. These scientists contended that mechanized excavation and drainage activities in wetlands, rivers and streams almost always cause the discharge of pollutants into waters of the U.S., and frequently result in severely harmful environmental effects. They noted that it is well-established in the peer-reviewed scientific literature that wetlands and many parts of river and stream beds act as natural sinks, collecting sediment, nutrients, heavy metals (*e.g.* lead, mercury, cadmium, zinc) toxic organic compounds (*e.g.,* polycyclic aromatic hydrocarbons-PAHs, polychlorinated biphenyls-PCBs) and other pollutants which enter wetlands through polluted runoff, direct discharges, and atmospheric deposition. Moreover, they provided citations which describe other characteristics of wetlands and water bottoms that also play an important role in storing precipitated metals and other pollutants. For instance, over time, fresh layers of sediment added to wetland and river and stream beds can gradually bury and sequester trace metals and toxics. Vegetation also helps soils immobilize toxins and heavy metals by attenuating flow of surface waters and stabilizing the substrate, allowing metal-contaminated suspended particles to settle into sediment.

Furthermore, these commenters cited scientific literature which illustrates that wetland soils and river and stream beds immobilize toxins and heavy metals and other pollutants. Briefly summarized, these indicate that anaerobic conditions occur when wetland, river, and stream soils are saturated by water for a sufficient length of time; microbial decomposition of organic matter in the sediment produces anaerobic conditions. The anaerobic soil environment, with the accompanying neutral pH levels and presence of organic matter in the sediment, triggers different chemical and microbial processes in the soils. These characteristic conditions of wetland, river, and stream soils result in the precipitation of trace and toxic metals as inorganic compounds, or complexed with large molecular-weight organic material—effectively immobilizing these compounds.

These commenters maintained, and provided citations illustrating, that when a wetland is ditched or drained, or a riverbed excavated, channelized or dredged, mechanized activities dislodge some of the sediments and resuspend them in the water column from both the bottom and the sides of the ditch or other waterbody. Water draining from ditched or excavated wetlands carries suspended sediments down ditches to receiving waters; similar resuspension and downstream movement occur when river and stream bottoms are channelized. They furthermore provided supporting literature from scientific journals documenting that when wetlands are ditched or drained or rivers and streams excavated, some pollutants move into the water column. As described, when wetlands soils are exposed to air, the anaerobic, neutral pH conditions that promoted toxins and heavy metals to precipitate-out can shift to aerobic conditions, and the soil chemistry is transformed by the oxidizing environment and possible shift in pH. The mobility of metals bound in sediment is generally determined by pH, oxidation-reduction conditions, and organic complexation—thus, precipitates may begin to dissolve and become available for transport when soils are exposed to air. Contaminated sediment resuspension does not usually result in a pH change in rivers; but there, as in wetlands, microbial action can release such pollutants as trace elements during the reoxidation of anoxic sediments that subsequently flow into drainage ditches and into receiving waters.

Finally, commenters from the science community pointed out that turbulence prolongs the suspension of sediment and contaminants in the water column, so moving water (*e.g.,* drainage ditches) retains suspended materials longer than standing water. In general, organic chemicals and toxic metals are more likely to be attached to smaller, lighter particles, which also are more likely to remain suspended in the water column. The commenters noted that smaller particles may also give up organic chemicals more efficiently than larger particles. Thus, they assert, exposing contaminated sediment to the water column causes some dissolution of pollutants, while the direct discharge of sediment into the water during dredging accelerates the release of contaminants.

The agencies thank these commenters for their detailed discussion of current scientific literature, which we have included in the administrative record. We agree that the evidence presented points to the harmful environmental effects that can be associated with redeposits of dredged material incidental to excavation activity within a particular water of the United States, even those redposits occurring in close proximity the point of initial removal. To the extent commenters believe that we should determine the scope of our jurisdiction based on such environmental effects, however, we decline to do so. As stated previously, today's rule does not adopt an effect-based test to determining whether a redeposit is regulated, but instead defines jurisdiction based on the definition of ''discharge of a pollutant'' in the Act and relevant caselaw. We have chosen to define our jurisdiction based not on the effects of the discharge, but on its physical characteristics—*i.e.,* whether the amount and location of the redeposit renders it incidental fallback or a regulated discharge. Nonetheless, the evidence reviewed in these comments points to serious environmental concerns that can be associated with redeposits other than incidental fallback (which are regulated under today's rule), and support the agencies' view that it would not be appropriate, as suggested by some commenters, to establish quantitative volume or other ''significance'' thresholds before asserting jurisdiction over such redeposits.

One technical commenter contended that the likelihood of toxicant release and mobility is many times greater for navigational dredging than it is for most other excavation activities, especially in wetlands. This commenter asserted that the primary reason for this is that the vast majority of excavation projects that would be subject to the proposed rule do not have toxic substances in toxic amounts present in the natural soils, but many navigational dredging projects in commercial ports do. The commenter stated that while it is true that some contaminants may be more mobile in an oxidized than reduced state, the conclusion that contaminants will be released from normal excavation project activities is without technical merit. The commenter further recommended that since the effects of navigational dredging were determined to be acceptable, the results of those same studies should be used to establish what is more than incidental fallback. As noted in today's preamble, the potential for release and distribution of pollutants contained in dredged material is a factor that would be considered in determining if a regulable discharge of dredged material beyond the place of initial removal results. We do not agree with the apparent suggestion that wetlands soils are necessarily in a pristine or natural state. As discussed in the proposed rule's preamble, wetlands can act as sinks for pollutants, and sequester contaminants. In addition, we note that the 404 program applies to waters of the U.S., which include not just wetlands, but rivers, lakes, harbors and the like as well. Finally, we do not agree that the environmental effects of harbor dredging should somehow be

used to establish what is more than incidental fallback. As previously noted in section III A 1 d of today's preamble and also discussed below, we do not believe that use of an effects-based test for jurisdiction is appropriate in light of the *AMC* and *NMA* decisions.

Other commenters strongly opposed the idea that the transport of dredged material downstream or the release of pollutants as a result of excavation activities should be treated as a discharge. Some of these commenters asserted that consideration of impacts on water quality resulted in the use of an ''effects-based test'' to establish jurisdiction, which they indicated was not allowable under the *NMA* decision. Others expressed the view that such an interpretation would result in regulation of incidental fallback and thus not be allowable.

These comments refer to the discussion in the proposed rule's preamble regarding the information that we would use to evaluate whether a regulable discharge has occurred. Among other things, that preamble stated:

> In evaluating [whether regulable discharges have occurred], the permitting authority will consider the nature of the equipment and its method of operation and whether redeposited material is suspended in the water column so as to release contaminants or increase turbidity, as well as whether downstream transportation and relocation of redeposited dredged material results.

65 Fed. Reg. at 50113.

The agencies continue to believe that when determining whether a discharge has occurred, it is relevant and appropriate to consider whether an activity results in the release and distribution of sequestered pollutants into the water column or in suspended material being carried away from the place of removal before settling out. In such cases, a pollutant is being added to a new location. This is not the use of an ''effects-based test'' to establish the existence of a discharge, but rather recognizes that when pollutants are released or relocated as a result of the use of earth-moving equipment, this can result in the ''addition'' of a ''pollutant'' from a ''point source'' to ''waters of the U.S.,'' and thus constitute a regulable discharge. In *Deaton,* the Fourth Circuit recognized that one of the reasons sidecasting should be treated as a regulable discharge is that: ''When a wetland is dredged, however, and the dredged spoil is redeposited in the water or wetland, pollutants that had been trapped may be suddenly released.'' *Deaton,* 209 F.3d at 336. The *NMA* court indicated that resuspension should not be used to regulate excavation and dredging activities that result only in incidental fallback. 145 F.3d at 1407. We would consider the nature and amount of any resuspension and transport in determining whether a regulable discharge occurred.

We also do not agree that allowing for consideration of the release of pollutants contained in the dredged material into the water column and the transport of suspended material downstream would necessarily result in the regulation of incidental fallback. These are relevant factors in determining if material has been moved to a new location, and consequently resulted in the addition of a pollutant to a new area. However, in evaluating these considerations, we would take into account the volume and location of redeposited material so as not to regulate incidental fallback.

A number of other commenters requested that the proposed rule be strengthened so as to require a permit for excavation and channelization activities which release even small amounts of pollutants (such as heavy metals or PCBs) into the water column or which would result in their transport down stream. Under today's rule, such pollutants (which constitute dredged material by virtue of having been dredged or excavated from waters of the U.S.) (see *e.g.,* 40 CFR 232.2 (defining dredged material as ''material that is dredged or excavated from waters of the U.S.)) would be regulated if resuspended and transported to a location beyond the place of initial removal in such volume so as to constitute other than incidental fallback. We believe that is the appropriate test for evaluating any redeposit of dredged material, for reasons stated previously. As explained elsewhere in today's preamble, we expect that the use of mechanized earth-moving equipment in waters of the U.S. will generally result in a regulable discharge. However, we do not believe that it is appropriate to *per se* treat the redeposits described by these comments as a discharge of dredged material, as consideration needs to be given to the factors of each particular case in making a regulatory decision.

E. Need for Brightline Test

Many commenters expressed concern that the proposal did not provide a clear definition of what constitutes a regulable discharge or incidental fallback. Many of these commenters were concerned that without clear standards that the regulated community or the regulators can use in order to determine when an activity is subject to federal jurisdiction, the proposal would have resulted in a system that was arbitrary and uncertain and was too vague in light of the CWA's civil and criminal penalty scheme. Some of these commenters expressed the view that without clear standards the rule would be void for vagueness, not meet the due process standard of providing fair warning of what activities are regulated, or violate the Constitution's non-delegation doctrine as construed in *American Trucking Association* v. *Browner,* 175 F.3d 1027 (D.C. Cir. 1999). Commenters also expressed concern that this would result in uncertainty and the need for subjective case-by-case determinations. Many of those concerned with the lack of a definition requested the proposal be withdrawn and re-proposed to include such a provision; some of these also indicated that guidance on what constitutes a regulable discharge versus incidental fallback needs to take the form of a rule, and should not be attempted through informal guidance.

Our May 10, 1999, rulemaking amended the substantive aspects of the definition of ''discharge of dredged material'' to provide that we no longer would regulate ''any'' redeposit, and that ''incidental fallback'' was not subject to regulation. That continues to be the case under today's final rule. As noted in section II B of today's preamble, the May 10 rulemaking was considered by the *NMA* court in its September 13, 2000, opinion and found to be in compliance with the *AMC* and *NMA* opinions and associated injunction. NAHB Motion Decision at 10. Today's rule does not alter the substantive regulatory definition of what constitutes a discharge. Rather than create arbitrary or unclear standards as some commenters have claimed, today's rule provides additional clarification for both industry and the regulatory agencies as to what types of activities are likely to result in regulable discharges.

In addition, the preamble to the proposed rule did provide guidance as to the agencies' views on what constitutes a regulable redeposit versus incidental fallback. For example, that preamble explained that as the *NMA* court and other judicial decisions recognize, the redeposit of dredged material ''some distance'' from the point of removal (see *NMA,* 145 F.3d at 1407) can be a regulable discharge. Similarly, the preamble noted the language from the *NMA* opinion describing what constitutes incidental fallback: involving the return of ''. . . dredged material virtually to the spot from which it came'' (145 F.3d at 1403), as well as occurring ''when redeposit takes

place in substantially the same spot as the initial removal.'' 145 F.3d at 1401). Moreover, as explained in section II C of today's preamble, in response to comments on the need for a definition of incidental fallback, we have modified the final rule to include a descriptive definition consistent with relevant case law. Since the definition of incidental fallback reflects discussion in the *AMC* and *NMA* opinions of incidental fallback, and those cases were discussed in the preamble to the proposed rule, we do not believe that this revision to our proposal necessitates reproposal.

A number of commenters requested that the agencies adopt a ''brightline test'' to distinguish between incidental fallback on the one hand and regulable discharges on the other. Some of the commenters opposed to the proposed rule expressed the view that the proposal was contrary to the *NMA* decision and the preamble to the agencies' earlier May 10, 1999, rulemaking, in that it did not provide a sufficiently reasoned or clear attempt to draw a line between incidental fallback and regulable redeposits. We believe that the descriptive definition of incidental fallback in today's rule will provide greater certainty, but do not agree that the court in *NMA* mandated that we take any particular approach to defining our regulatory jurisdiction. *NMA* only stated that ''a reasoned attempt by the agencies to draw such a line would merit considerable deference.'' 145 F.2d at 1405 (footnote omitted). As discussed previously, a descriptive definition of incidental fallback has been added to today's final rule. We do not believe that a more detailed definition is appropriate at this time.

Some comments suggested drawing a bright line on the basis of measurable criteria such as cubic yards of dredged material, total acres of land disturbed, gallons of water removed, tons of sediment disposed, or similar measures. Although consideration of factors such as the volume and amount of the material and nature and distance of relocation are relevant in determining whether incidental fallback or a regulable discharge occurs, these factors are inter-twined with one another, and do not lend themselves to a segregable hard and fast quantification of each specific factor (or combination of factors) so as to give rise to a hard and fast test. Moreover, we are not aware of, nor have commenters suggested, a sound technical or legal basis on which to establish brightline quantifiable limits on such factors. For example, we do not believe it is technically sound or feasible to simply establish universally applicable cut-off points for amount or distance.

Another commenter requested a brightline test be established by having the rule state a presumption *against* discharge for incidental soil movement associated with mechanized landclearing and excavation activities. More specifically, this commenter recommended that the rule provide that no discharge results from incidental soil movement associated with mechanized landclearing, ditching, channelization, draining, in-stream mining, or other mechanized excavation activity such as when (1) excavated soils and sediments fall from a bucket, blade or other implement back to the same general area from which it was removed; (2) surface soils, sediments, debris or vegetation are scraped, displaced or penetrated incidental to the use of machinery; (3) excavation machinery is dragged through soils or sediments; or (4) vegetative root systems are exposed, or trees and stumps are knocked down or uplifted, incidental to the use of machinery. The commenter's recommendation went on to provide that otherwise the Agency may demonstrate on a case by case basis that mechanized excavation activity in waters of the U.S. results in the discharge of dredged material.

We do not agree with this suggestion for a number of reasons. First, we believe a test of the ''same general area from which it was removed'' for determining whether incidental fallback has occurred could create the impression that material redeposited in virtually any part of the work area would not be a discharge, which we believe would be too broad of a test. As both *NMA* and *Deaton* recognize, for example, placement of dredged material in as close a proximity to the excavation point as the side of a ditch can result in a regulable redeposit. We thus believe a formulation based upon use of a ''same general area test'' to be too expansive to properly convey that short-distance relocations can result in regulable discharges. As discussed in section II C of today's preamble, we do believe a fair and objective reading of the *AMC* and *NMA* cases and the NAHB Motion Decision, as well as other relevant redeposit cases discussed in that section of the preamble, is that incidental fallback occurs when redeposit takes place in ''substantially'' the same place as the initial removal, and have so provided in today's final rule.

Moreover, the examples provided by the commenter (*e.g.,* dragging of equipment, scraping or displacement of soil or vegetation, uplifting of tree roots) often can result in the relocation and redeposit in waters of the U.S. of substantial volumes of material over considerable distances so as to constitute more than incidental fallback under the *AMC* and *NMA* opinions. The approach suggested by this commenter reflects perhaps a different conception of what constitutes incidental fallback than is contained in today's rule. If incidental fallback were to include any material incidentally redeposited in the course of mechanized activity, the establishment of a presumption of exclusion of the activities listed by the commenter might follow as reasonable. As discussed immediately above in this section, however, we believe that this formulation is not warranted and would be too broad. We believe that we have properly described incidental fallback in today's rule, and that it would not be reasonable to assume the activities listed by the commenter only cause incidental fallback. In fact, as today's rule clarifies, we regard such activities as typically resulting in more than incidental fallback, absent project-specific information to the contrary. However, there is substantial flexibility under today's rule to consider the types of activities listed by the commenter and determine on a case-by-case basis whether a specific project is subject to regulation.

Other commenters recommended that while the term ''discharge'' should not encompass the fallback of material precisely to the same spot during excavation activities, when the movement of the dredged material raises new environmental concerns (such as release of pollutants into the water column or more ready erosion of the material and movement downstream), this relocation should be treated as a discharge. These and other commenters also requested that the rule make clear that a permit is required for excavation and channelization activities which release even small amounts of pollutants (such as heavy metals or PCBs) into the water column or which would result in their transport downstream. For reasons stated previously, we do not agree that whether an activity results in new environmental concerns should be used as the basis for establishing jurisdiction. As discussed in both the proposed rule's and today's preamble, the nature and amount of transport and resettling of excavated material downstream from the area of removal, or release of pollutants previously bound up in sediment beyond the place of initial removal, are relevant factors to consider in determining if movement and relocation other than incidental fallback

has occurred. Thus, these factors are relevant to determining whether a redeposit other than incidental fallback occurs, and are not used to assert jurisdiction on the basis of environmental effects.

Other comments urged that the rule identify certain activities as always requiring a permit or consisting of a regulable discharge. Examples mentioned in such comments included sidecasting, backfilling, and stockpiling; those supporting strengthening of the proposal also included bulldozing, grading, and leveling as always requiring a section 404 permit. As previously discussed in section II C of today's preamble and the preamble to the proposed rule, case law has found a number of activities (*e.g.,* sidecasting, backfilling of trenches) to be regulable discharges under section 404. We believe the preamble discussion on these points to be sufficiently clear and that inclusion of such specific examples in the regulation itself is unnecessary. To the extent grading and leveling involve redistribution of soils in waters of the U.S. around a site to create a level area, such activities would appear to typically involve not only a discharge of dredged material (through the pushing of dredged material from one location to another) but also possibly fill material (by filling low areas). *See Avoyelles* (movement of soils to depressed areas as discharge of fill material). In any event, case law on redeposit issues continues to evolve over time. Accordingly, we do not believe the listing of specific examples of discharges in the regulation itself to be appropriate.

F. Clarity of Proposal and Implementation Issues

1. Clarity

A number of commenters sought clarification with regard to section 404(f), as they were concerned or confused by the references to section 404(f) in the preamble to the proposed rule. Most of these commenters interpreted the preamble language to indicate that the rule would establish that certain silviculture or farming activities described in section 404(f) as being exempt from permit requirements would now be subject to regulation, particularly because these activities may involve the types of machinery and actions referenced in the proposal.

We regret that the references to section 404(f) in the preamble may have caused confusion regarding the relationship of section 404(f) to the rulemaking and emphasize that today's rule does not change the interpretation or use of the exemptions in any manner. Today's rule concerns the fundamental issue of what activities result in a discharge that is regulated under section 404. The section 404(f) exemptions describe those activities that, although resulting in a discharge, do not require a permit if they are conducted consistent with that provision. Activities covered by section 404(f), including silviculture, ranching, and agriculture, involving the use of equipment and methods such as those described in the rulemaking remain exempt, subject to the provisions of section 404(f), and are not altered by today's rule.

2. Comment Period

Two commenters requested an extension of the public comment period in order to better gauge the effects of the rule on their membership. One of these requested additional time to assess the potential impacts of the proposal on their industry and also requested a public hearing on the proposal. The other commenter expressed the view that the proposal was fundamentally different from previous iterations of the Tulloch Rule, and sought additional time in order to obtain more information on the physical settings and the use of many types of equipment by its membership. We believe that a 60-day comment period was adequate time to obtain widespread and effective public comment and that extending the public comment period or holding a public hearing is unnecessary. In general, it appears the public understood the proposal and was able to provide comments in a timely fashion. Of the approximately 9,650 comments that were received, only two sought an extension of the comment period, and only one of those requested a hearing. In addition, those two commenters did file specific and substantive comments within the 60-day comment period.

3. Implementation

A number of commenters raised issues associated with the implementation of the rule, including the ability of the agencies to effectively enforce, monitor, and budget for it, as well as the appropriate exercise of discretion on behalf of the agencies. Several commenters indicated that the agencies need to dedicate enough staff and other resources necessary to effectively enforce the rule. One commenter specifically recommended that the agencies request the necessary funding from Congress to allow effective implementation. Another commenter specifically mentioned the need for the agencies (or States or local governments) to monitor activities not requiring a permit, to determine if they were in fact not resulting in a discharge. One of these commenters supported review and documentation of completed projects determined a priori to not result in a discharge, to ensure that in fact no discharge resulted. One commenter who supported the objective of the proposed rule nonetheless recommended that we streamline the permitting process associated with activities that may involve incidental fallback. Another commenter specifically cited concern that the Corps would not be able to efficiently process permits and asserted that the processing of Nationwide General Permits is not as efficient as the agencies contend.

We concur with the commenters who stated that it was important for us to have adequate resources to effectively enforce, monitor, and otherwise implement the proposed rule. Consistent with agency priorities for aquatic resource protection and our overall missions, we do propose budgets to adequately accomplish our CWA statutory objectives. Effective enforcement and monitoring is an important part of the section 404 regulatory program. We will coordinate with State and local partners to ensure that today's rule, as well as wetlands regulations, in general, have effective compliance. Over the last two years, unreported Tulloch activities presented a challenge to us in obtaining information on the extent and nature of wetlands destruction that has occurred following the *NMA* decision. While many of these challenges remain, we believe that satisfactory monitoring, in cooperation with others, can be accomplished to adequately track the results of today's rule. We agree that pre-project information alone should not necessarily be the basis for concluding that an activity results only in incidental fallback and that other measures, such as field investigation or site visits, may be needed to assess whether an activity has actually resulted in any regulable discharges.

The agencies' goal is to work cooperatively with the public to ensure that their activities in the Nation's waters are fully consistent with the requirements of the Act and its implementing regulations, including today's rule. The Corps of Engineers is the principal contact for the public both in the context of responding to questions that arise prior to conducting any proposed activity in waters of the U.S., as well as monitoring permitted and unpermitted activities as they proceed in waters to verify compliance with permit conditions or, in the case of unpermitted activities, to ensure that no

regulable discharge takes place. Consistent with its statutory responsibilities and relevant Memoranda of Agreement between EPA and the Corps, EPA also may serve as the lead agency in determining whether a regulable discharge has occurred.

It is a more effective use of agency resources and more efficient for project proponents to coordinate with the Corps before an activity in waters of the U.S. occurs to determine whether or not the project triggers the need for a CWA permit. We strongly recommend that anyone proposing projects which, for example, involve earth-moving activities using mechanized equipment such as bulldozers or backhoes contact the Corps well in advance of the project to determine whether or not a regulable discharge will occur. As appropriate, the Corps will also be involved in working with the public on a project-specific basis to monitor ongoing or completed projects which proceed without a section 404 permit through site visits, remote sensing, field investigations and so forth to verify that no regulable discharges have occurred.

With respect to streamlining the permit process for discharges that may involve incidental fallback, we note that neither the proposal nor today's rule establishes new procedural or informational requirements. In addition, we have provided additional discussion in today's preamble (see section II C) as well as a descriptive definition of incidental fallback in order to clarify the factors and information relevant to making the determination of incidental fallback versus regulable discharge. Given that case-specific evidence regarding whether an activity results only in incidental fallback will be considered, general authorizations based on a common set of circumstances would be inappropriate.

We have undertaken a number of successful efforts to ensure that activities regulated under the section 404 program are evaluated in an efficient manner, while ensuring environmental protection. In particular, with regard to the comment on the development and use of Nationwide General permits, such permits have provided an efficient process for allowing discharges with truly minimal impacts to move forward with little regulatory review, consistent with conditions that provide for aquatic resource protection. Despite successive annual increases in the use of general permits over the last ten years, processing times have remained low. Some 63,780 general permits required a priori action on the part of the Corps in Fiscal Year 2000 (as compared with approximately 4,313 individual permits), and these were evaluated in an average time of only 19 days.

A number of commenters addressed the issue of discretion by the agencies in implementing today's rule. The majority of these commenters advocated that discretion on the part of Corps Districts should be minimized. Several commenters stressed the need for consistent interpretation and application of the rule, citing the fact that several State and local jurisdictions have multiple Corps Districts. Other commenters noted that national guidance or consultation with the Headquarters offices of the agencies should be required, particularly if any local operating procedures for the rule are developed. One commenter recommended that Corps field staff document all communications with potential dischargers and submit such information to Corps and EPA Headquarters for periodic review. One commenter indicated that if any determination is a ''close call'' with regard to whether or not a discharge constitutes incidental fallback, it should be considered regulated in order to err on the side of protecting wetlands. One commenter asked for clarification that previous understandings with Corps Districts regarding certain ''Tulloch'' activities would remain in effect, specifically mentioning the preamble text in the proposed rule regarding the cutting of vegetation, as well as the use of vehicles and other ''landclearing and excavation practices that have been deemed to fall within the exclusions . . . under the *Tulloch* Rule.'' Another commenter provided a specific example of guidance provided by a District that the commenter asserted ran counter to the agencies interpretation of the *NMA* decision: that entities ''may engage in instream mining and dredging if the intent of the work is to create a discharge of dredged material that results only in incidental fallback.''

We concur with those commenters that advocate consistent implementation of today's rule across Corps Districts, but also recognize that the case-specific nature of incidental fallback determinations necessitates some element of discretion. We have developed guidance on program implementation in light of the *AMC* and *NMA* decisions (issued on April 11, 1997, and updated on July 10, 1998), as well as provided further guidance in the May 10, 1999, rulemaking and today's rulemaking action. As additional issues are raised in the application of today's rule that lend themselves to additional guidance, we will provide such guidance. Moreover, to the extent that regional circumstances allow regional guidance to be provided on circumstances common to a particular part of the country, we will provide that as well. In the preparation of any regional guidance and in the consideration of ''close calls,'' our headquarters will provide oversight and review to assist our field staff in reaching determinations that are consistent with governing law.

With respect to previous understandings with Corps Districts regarding the regulation of certain ''Tulloch'' activities, today's rule describes how potential discharges will be addressed. While the lack of specific details in many of the specific comments prevents us from making a determination here, we can clarify that the cutting of vegetation above the roots is not regulated as a discharge of dredged material under section 404. 33 CFR 323.2(d)(2)(ii) and 40 CFR 232.2. Likewise, driving vehicles such as cars, off-road vehicles, or farm tractors through a wetland in a manner in which such vehicle is designed to be used generally is not subject to regulation under CWA section 404. See our August 4, 1995, guidance entitled ''Applicability of Clean Water Act Section 404 to Vehicle Use in Waters of the U.S.'' Landclearing and excavation practices are discussed above in section III C of today's preamble. With respect to the comment on guidance said to have been provided by a District that entities ''may engage in instream mining and dredging if the intent of the work is to create a discharge of dredged material that results only in incidental fallback,'' the proper consideration is not the intent of the discharger, but whether, in fact, the activity results in only incidental fallback.

G. Need to Amend CWA

One commenter, while disagreeing with the *NMA* decision and its reasoning, indicated that besides rulemaking, the agencies also should seek action by Congress to amend the CWA so as to clarify agency authority to fulfill their duty under the CWA to protect the Nation's waters. Other commenters who were opposed to the proposed rulemaking expressed the view that it was necessary to obtain an amendment to the CWA before, or instead of, proceeding with rulemaking. Many of these commenters believed that the proposed rule exceeded the agencies' authority under the CWA (see discussion in section III A of today's preamble) and thus could not be undertaken without an amendment to the Act. In fact, one such commenter suggested that language in EPA

Administrator Carol Browner's Press Release announcing the August 16, 2000, proposal reflected a recognition that the agencies do not have the authority to undertake the action reflected in this rule because it called on ''Congress to strengthen the Clean Water Act to fully protect and restore America's wetlands.'' Others felt that in light of the uncertainties and importance of the issue it was appropriate or even necessary to wait for Congressional action before proceeding. We do not agree. We believe today's rule is entirely consistent with the current CWA and relevant case law, and helps to clarify for the regulated community and the agencies what activities are likely to result in regulable discharges. In keeping with the *AMC* and *NMA* cases and the NAHB Motion Decision, today's rule does not provide for regulation of ''incidental fallback,'' and a descriptive definition of that term has been provided in today's rule language. The language in the press release calling on Congress to strengthen the Act was a recognition that the statute, as interpreted in *AMC* and *NMA,* does not extend to regulating incidental fallback. Since today's rule does not regulate incidental fallback, but rather articulates an approach to determining whether redeposits of dredged material come within our existing statutory authority, today's rule is consistent with both the press release and the CWA as interpreted by the courts.

H. Other Issues

1. Loss Data

As noted in the proposed rule, available information indicated that more than 20,000 acres of wetlands were subject to ditching and more than 150 miles of stream channelized since the *NMA* decision. The activities causing such ''Tulloch'' losses typically take place without a CWA section 404 permit, and therefore are not systematically reported to either EPA or the Corps of Engineers. As a result, the numbers are believed to likely underestimate actual Tulloch losses. The proposed rule invited the public to submit further relevant information on Tulloch losses.

One commenter suggested that this invitation to submit data on Tulloch losses was an attempt to establish a *post hoc* rationalization for today's rule. We disagree. The CWA section 404 establishes a regulatory program for discharges of dredged material into waters of the U.S. The Act does not establish a threshold of impacts after which an activity will be regulated, nor as explained in sections III A 4 and III D of today's preamble, does today's rule use an effects-based test to establish jurisdiction. As a result, we do not need aggregate data showing extensive Tulloch losses or impacts to justify today's rulemaking. Such information is nonetheless helpful in answering inquiries from the public about the impacts of Tulloch activities, as well as in helping focus our limited resources on important environmental problems.

Many commenters emphasized that the uncertainty created by the *NMA* decision has led to a surge in wetlands drainage, resulting in deposits into wetlands of both unregulated ''incidental fallback'' and regulable redeposit of dredged material. Commenters expressed concern that project proponents may decide that a section 404 permit is not necessary and not contact the Corps for verification. One commenter described a philosophy of ''if you don't ask, you don't have to worry about being told no.'' Several commenters suggested that Tulloch losses will continue to increase until the regulatory definition of ''discharge of dredged material'' is clarified and legislation closes the Tulloch ''loophole.'' We appreciate these concerns and believe that by setting forth our expectation as to activities that are likely to result in regulable discharges, today's rule will help enhance protection of the Nation's aquatic resources.

Several commenters asserted that the proposal's estimates of Tulloch losses were conservative, and do not include impacts from numerous activities occurring throughout the U.S. For example, one commenter noted that its State data underestimated total wetland acres drained because estimates were based on less than 80% of identified sites on which unauthorized drainage had occurred. Other commenters emphasized that comprehensive data on Tulloch losses is difficult because developers are not contacting the Corps of Engineers or EPA about many of their projects. We agree that because Tulloch losses are not systematically reported, we have likely underestimated the magnitude of these losses.

Numerous commenters submitted information about wetlands and stream losses since the decision in *NMA,* and emphasized that impacts are national in scope. One commenter noted that Tulloch losses have been reported in some of the six ecoregions in the U.S. that have been targeted for special investment due to their biological diversity, and expressed concern that future losses in these key regions could have serious impacts on tourism, fishing, and other industries reliant on ecological resources. Many commenters highlighted Tulloch losses in their areas, or described aquatic resources that could be destroyed by future projects unregulated due to the ''Tulloch loophole.'' These examples illustrate the nationwide implications of the NMA decision. Descriptions were received of losses in Arkansas, California, Connecticut, Georgia, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Oregon, Tennessee, Wisconsin, and Virginia, among others. Public comments providing these examples are included in the record for today's rule.

Many commenters discussed the environmental effects of Tulloch losses. Some commenters noted that extensive ditching and drainage of wetlands had resulted in siltation, sedimentation, and turbidity violations in designated shellfish waters, primary and secondary fishery nursery areas, and other sensitive coastal and estuarine waters. Commenters described potential adverse effects of instream mining on anadromous fish habitat in the Pacific Northwest and other regions. Several commenters expressed concern about the potential impacts on prairie potholes and other wetlands that provide important habitat for migratory waterfowl. Several commenters expressed concern about impacts on neighbors of unregulated wetlands drainage. Other adverse environmental effects from Tulloch losses described by commenters included: flooding of neighboring businesses, homes and farms; degradation of receiving waters; shellfish bed closures; degradation of drinking water supplies; loss of critical habitat; loss of aesthetics; loss of recreational activities such as bird watching; and increased toxics loadings from disturbed sediments.

Several commenters discussed the environmental impacts of the discharge of dredged material. One commenter quoted the court decision in *Deaton,* noting that the environmental impacts from the discharge of dredged material ''[a]re no less harmful when the dredged spoil is redeposited in the same wetland from which it was excavated. The effects of hydrology and the environment are the same.'' The adverse environmental impacts of discharge described by commenters included such effects as: increased turbidity; reduced light penetration; mortality of aquatic plants and animals; depletion of dissolved oxygen; resuspension of contaminants; release of pollutants (heavy metals, nutrients, and other chemicals) from suspended material;

biological uptake of pollutants; sedimentation and smothering of benthic organisms; algal population explosions; fish kills; nuisance odors; and a decline in biodiversity. As we noted in our discussion of the comments concerning the use of an effects based test to establish jurisdiction (see section III A 1 d of today's preamble), today's rule does not attempt to regulate activities beyond the scope of the CWA or base our jurisdiction on effects.

Some commenters characterized as unsubstantiated the preamble's estimates of wetland acres lost and stream miles channelized after the Tulloch Rule's invalidation. One commenter also suggested that data on Tulloch losses should be grouped by industry category. We agree that precise comprehensive data on Tulloch impacts is difficult to collect. The estimates discussed in the proposal reflect projects that have come to the attention of agencies' field offices, through field observations, individual reports, and/or newspapers and other information sources. We believe that the preamble estimates of Tulloch losses are conservative, because persons undertaking such activities often proceed under the assumption that no authorization from the Corps is required. The proposal's request for information on Tulloch losses is intended to help ensure available data is as complete as possible. We do not agree, however, that the collection and categorization of data by industry is necessary, because today's rule does not regulate by industry category but on the basis of discharges to waters of the U.S.

One commenter asserted that Tulloch losses have been more than offset by mitigation required for permitted losses, because the preamble to the proposal cites estimates of over 20,000 acres of unregulated wetlands loss after invalidation of the Tulloch Rule, plus an estimated 21,500 acres of wetlands lost through authorized activities in 1999, with 46,000 acres of compensatory mitigation obtained in 1999. However, only permitted losses resulted in obtaining compensatory mitigation. Compensatory mitigation ratios for permitted losses are typically higher than 1:1 to address a variety of factors considered during permit evaluation, such as the expected likelihood of success; the percentage of restoration, enhancement, and/or preservation intended; the temporal loss of functions and values before the mitigation is fully functioning; and other relevant considerations. Tulloch losses, on the other hand, involve activities which are not subject to environmental review or compensatory mitigation. Thus, the compensatory mitigation figures reported in the proposed rule's preamble were designed to offset permitted losses only, not Tulloch losses.

One commenter disagreed about implications of wetlands losses, expressing doubt about whether wetlands losses might result in a potential for increased flooding, and characterizing the link between the two as an unsupported assumption. We note, however, that an extensive body of scientific literature indicates that wetlands typically store water at least temporarily, keeping it from flowing further downhill and downstream, thereby helping reduce the frequency and severity of flooding. For example, the U.S. Geological Survey's National Water Summary on Wetlands Resources (1996) notes that ''[i]n drainage basins with flat terrain that contains many depressions (for example, the prairie potholes and playa lake regions), lakes and wetlands store large volumes of snowmelt and (or) runoff. These wetlands have no natural outlets, and therefore this water is retained and does not contribute to local or regional flooding.'' Other studies, such as the 1994 report by the Interagency Floodplain Management Review Committee, similarly have found links between wetlands losses and flooding. Sharing the Challenge: Floodplain Management Into the 21st Century, at Vol. 1, pg. ix; Vol. V at pp 79–88.

2. Miscellaneous Issues

One commenter raised an issue with respect to whether or not snow plowed into headwater creeks would be regulated by today's rule. Although we recognize that other Federal or State requirements may govern such an activity, we do not regulate snow plowing into waters of the U.S. under section 404. Today's rule addresses discharges of dredged material, which snow is not. However, if during a snow removal operation, snowplows, front loaders, bulldozers, or similar equipment discharge gravel, sand, or other material into waters of the U.S. or move sediment or soil to new locations within a water of the U.S., then such activities would be regulated under section 404.

Some commenters raised concerns about the definition of ''waters of the U.S.,'' expressing the view that the term is very broad and may be overly inclusive. Today's rule clarifies the definition of the term ''discharge of dredged material'' regulated under CWA section 404. It does not address the definition or scope of ''waters of the U.S.'' We are contemplating initiating rulemaking to clarify the definition of ''waters of the U.S.'' (see the Unified Regulatory Agenda, 65 FR 23574 (April 24, 2000)), and would encourage public comments on a proposed definition at that time. We also note issues related to the scope of ''waters of the U.S.'' are currently pending before the Supreme Court in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers* (No. 99–1178) (*SWANCC*).

One commenter indicated support for the deletion of the ''grandfather'' provision that was a part of the previous definition of dredged material. We agree, and today's final rule deletes that provision as being out of date and no longer necessary.

A number of commenters raised issues that, while related to wetlands regulation, were not germane to the proposed rule. Examples include comments regarding delineation methodology or geographic jurisdiction of the section 404 program, fill material regulation or the agencies proposed rulemaking regarding the definition of fill material, and general statements about section 404 regulation. These comments have been made available to other relevant dockets or addressed, as appropriate, in the record for today's rule.

3. Economic Issues

Many commenters opposed to the rule expressed concern over its economic effects. Some of the commenters raising economic concerns believed that the proposal would have regulated ''incidental fallback'' or was a return to the Tulloch Rule invalidated by the court in *AMC* and *NMA.* Many of the comments raising economic issues questioned the discussion in the proposed rule's preamble that it did not alter or enlarge section 404 program jurisdiction or create information requirements. Other commenters expressed concern with the expense and difficulty of rebutting the presumption contained in the proposed rule, especially when, in their view, this was a standardless proposition. Another asserted their belief that the reference in the proposed rule preamble to ''potentially'' regulated entities was misleading, as all persons engaging in excavation activities listed in the rule would be regulated. Some of the commenters believed the proposal would have an annual economic effect of more than $100 million dollars, and that issuance of the proposal without a detailed economic analysis or consulting with affected entities violated the requirements of the

Regulatory Flexibility Act (RFA) as Amended by the Small Business Regulatory Enforcement Fairness Act or the Unfunded Mandates Reform Act (UMRA). Some of the commenters expressed concern that, coupled with the changes made in the Corps Nationwide Permit Program, the proposal would result in increased delays in obtaining authorizations; one commenter believed the proposal somehow superceded existing Nationwide Permits. Others questioned how the proposed rule could be deemed to have small economic effects when the preamble to the proposal noted upwards of 20,000 acres of wetlands were subject to ditching and more than 150 miles of streams channelized. Others questioned why, if the rule was not economically significant, it was deemed a ''significant regulatory action'' for purposes of Executive Order 12866. One commenter expressed concern over the absence of a grandfather provision.

We continue to believe that the economic impacts of the rule will be insignificant. While some of the commenters expressing concern with economic impacts believed they would have to consult in advance with the Corps or that all excavation activities would be subject to regulation, this is not the case. Nothing in today's rule alters the current regulatory provisions that exclude incidental fallback from regulation as a discharge, provisions which were found to comply with the *AMC* and *NMA* decisions by the court in its NAHB Motion Decision. Today's rule does not alter that *status quo*, and we thus do not agree with commenters whose economic concerns were premised on the proposal somehow enlarging program jurisdiction or reinstating the invalidated Tulloch Rule. See also section III A of today's preamble for further discussion.

Moreover, as noted in section II C of today's preamble, the final rule has been clarified in a number of respects to make clear it is not creating or imposing new process or information requirements and will not result in substantially increased workloads. First, it no longer uses a rebuttable presumption. Second, the final rule has been clarified to expressly provide that it does not alter any burden in any administrative or judicial proceeding under the CWA. Finally, we have provided a descriptive definition of incidental fallback which helps to clarify for both the regulated community and regulatory staff the type of redeposits which are not subject to regulation. In this respect, it may actually reduce costs for the potentially regulated entities conscientiously attempting to comply with the existing regulations. Moreover, as noted and discussed numerous times in today's preamble, the final rule continues to provide for project-specific considerations in determining if more than incidental fallback results. In this regard, the proposed rule's preamble reference to ''potentially'' regulated entities was intended to convey this case-by-case nature, and the final rule preamble thus continues to use that formulation. For all of these reasons, we continue to believe that today's rule does not have substantial economic effects, and does not trigger the requirements of the RFA as amended or UMRA.

Today's rule does not affect section 404 Nationwide permits for dredged material discharges. Rather, it clarifies the types of activities which we regard as being likely to result in regulable discharges. Where only incidental fallback results, a regulable discharge of dredged material does not occur, and there is no obligation to obtain coverage under either an individual or a Nationwide permit. Some of the commenters expressed concern over lengthy permit review times under Nationwide and individual permits; we do not believe that the facts warrant these concerns and have included the most recent available statistics on permit review time in the administrative record for informational purposes, although, as just noted, the rule does not alter existing requirements for permit coverage. With regard to commenters raising concerns over the economic effects of changes that have been made in the Nationwide permit program (see 65 FR 12818), although outside the scope of today's rule, we note that the Corps has prepared and is continuing to work on economic documentation related to that program.

We do not believe there is any inconsistency in the discussion of Tulloch losses in the proposed rule's preamble and the conclusion that the rule will not have significant economic effects. As evidenced by photos from field visits, some of those losses were accompanied by substantial relocation and movement of dredged material, and thus seem to reflect the mistaken belief that any excavation or drainage activity is exempt from regulation under CWA section 404, regardless of the presence of a discharge. Activities resulting in a discharge of dredged material already are subject to regulation under CWA section 404 and today's rule does not alter this jurisdictional prerequisite.

With regard to questions concerning consistency of our conclusion that the rule does not have significant economic impacts even though it was submitted for review under Executive Order 12866, we have clarified in today's preamble (see section IV B below) that this submittal is not made on the basis of economic effects, but rather on the portion of that Executive Order addressing, among other things, rules which involve legal or policy issues arising out of legal mandates or the President's priorities. In light of past litigation challenging the 1993 Tulloch Rule and the importance of effectively protecting our Nation's aquatic resources, the proposed and final rules were submitted for review under Executive Order 12866. Finally, with regard to the commenter expressing concern over the absence of a grandfather provision, we have not included one as today's rule still provides for consideration of project-specific information, and does not create new substantive or procedural requirements. We thus do not believe a grandfather provision is appropriate.

4. Tribal and Federalism Issues

Several commenters raised concerns that the proposed rule would have substantial direct effects on States, and so is subject to the ''Federalism'' Executive Order 13132 (64 FR 43255 (August 10, 1999)). One commenter additionally noted that the proposed rule imposes significant compliance costs on Tribal governments, and therefore must comply with the consultation requirements of Executive Order 13084. Some commenters were concerned specifically about the potential information burden of rebutting the presumption. We disagree that today's rule will have a substantial direct impact on States or impose significant compliance costs on Tribes. Today's rule does not change CWA section 404 program jurisdiction, nor affect a discharger's obligation to obtain a section 404 permit for discharges of dredged material into waters of the U.S. Section 404 always has regulated the ''discharge of dredged material.'' Today's rule simply clarifies program expectations of what activities are likely to result in a regulable discharge. In addition, today's rule does not use the proposal's rebuttable presumption formulation, and has been clarified to expressly state it does not shift any burden in any administrative or judicial proceeding under the CWA.

Two commenters suggested that the CWA section 404 program itself was inconsistent with federalism principles, because it imposed on the traditional State area of regulating land use or is only weakly connected to a Federal responsibility. Such comments are

beyond the scope of today's rulemaking. However, we do not agree that the section 404 program is inconsistent with federalism principles. Controlling the impacts of pollution and protecting natural resources has long been a matter of joint Federal and State concern, and the Federal government long has legislated in the field of environmental pollution control and resource protection. Section 404 does not constitute conventional land use planning or zoning, but instead is a form of environmental protection and pollution control that leaves the ultimate determination of land use to State and local authorities consistent with Federal pollution control requirements. In a case involving impacts of mining on Federal lands, the U.S. Supreme Court expressed the distinction this way: ''Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.'' (*California Coastal Commission* v. *Granite Rock Co.,* 480 U.S. 572, 587 (1987)). Section 404 does not dictate the particular use for a parcel of property; it regulates the manner in which the proposed use can be accomplished by avoiding and/or mitigating the environmental impacts of a discharge of dredged or fill material into waters of the U.S.

One commenter argued that the proposed rule unlawfully expanded Constitutional limits to the Corps' ability to protect biological resources, by including protection of habitat with significant biological value but little or no commercial value. The commenter stated that such habitat does not involve interstate commerce, and as a result is beyond Federal powers and should be protected by State and local governments. This issue is not within the scope of today's rulemaking and raises questions about the definition of ''waters of the U.S.'' which are currently pending before the U.S. Supreme Court in *SWANNC*. In addition, nothing in today's rule limits a State or local government's ability to protect habitat and other resources.

One commenter suggested that Federal regulation is not necessary because ample State and local authority exists to protect wetlands. Again, this issue is beyond the scope of today's rulemaking. We disagree about the lack of a need for a Federal presence in wetlands regulation. The Federal wetlands program both addresses interstate issues arising from wetlands protection, and helps support the States' own environmental objectives. For example, the section 404 program helps protect States from the effects that filling of wetlands in one State may have on water quality, flood control, and wildlife in another State. States with wetlands programs might coordinate closely with the Federal program, as a means of avoiding duplication and reducing any administrative burden. For example, States might choose to coordinate their environmental studies with Federal initiatives or to use Federal expertise in identification and mapping of wetlands. We also note that in the *SWANCC* case, eight states filed an *amicus* brief explaining the benefits of 404 regulation to the states and expressing their support for such regulation (CA, IA, ME, NJ, OK, OR, VT, and WA).

One commenter argued that no Federal reason has been demonstrated for regulating activities such as ditching and channelization, and the proposal should not be finalized until an economic analysis is completed that supports a valid Federal reason to ''expand'' the Corps' authority. Another commenter noted that the *NMA* decision has forced a number of States to incur significant financial costs by acting to stem further wetlands destruction, and that limited funding has prevented some States from stepping into the post-*NMA* loophole. We note that today's rule does not regulate on the basis of ditching and drainage activities, but instead on the presence of a discharge of dredged material into waters of the U.S., as called for under the CWA. Today's rule does not expand the scope of CWA section 404 program jurisdiction, nor establish a new program or new required processes affecting the regulated community. For these reasons, we do not agree that today's rule requires an economic analysis such as that called for by the commenter.

We note that many Federal environmental programs, including CWA section 404, were designed by Congress to be administered at the State or Tribal level whenever possible. The clear intent of this design is to use the strengths of the Federal and State and Tribal governments in a partnership to protect public health and the Nation's resources. EPA has issued regulations governing State and Tribal assumption of the section 404 program (40 CFR part 233). The relationship between EPA and the States and Tribes under assumption of the section 404 Program is intended to be a partnership. With assumption, States and Tribes assume primary responsibility for day-to-day program operations. EPA is to provide consistent environmental leadership at the national level, develop general program frameworks, establish standards as required by the CWA, provide technical support to States and Tribes in maintaining high quality programs, and ensure national compliance with environmental quality standards. Currently two States (New Jersey and Michigan) have assumed the section 404 program.

One Tribal commenter felt that the proposed rule impinges on Tribal sovereignty, in that it does not allow Tribal decisions to undertake ditching activities for flood control without Federal review. This commenter also contended that the agencies did not comply with Executive Order 13084 which would have required that the agencies consult with the Tribes on the proposed rule under certain circumstances. The commenter stated that the agencies' conclusion that the proposed rule will not significantly effect Indian communities nor impose significant compliance costs on Indian Tribal governments is erroneous. As mentioned above, today's rule does not change program jurisdiction. In addition, it does not create any new formal process. In fact, unlike the proposal, the final rule does not employ a rebuttable presumption, and also has been clarified to expressly provide that it does not shift any burden in any administrative or judicial proceeding under the CWA. We thus believe the rule does not create an impingement to Tribal sovereignty or significantly affect Tribal communities.

IV. Administrative Requirements

A. Paperwork Reduction Act

This action does not impose any new information collection burden or alter or establish new record keeping or reporting requirements. Thus, this action is not subject to the Paperwork Reduction Act.

B. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether the regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or

State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action'' in light of the provisions of paragraph (4) above. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the public record.

C. Executive Order 13132 (Federalism).

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires us to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This rule does not have federalism implications. As explained in sections II and III of today's preamble, the rule does not alter or enlarge section 404 program jurisdiction and therefore does not affect a discharger's (including State dischargers) obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the rule identifies what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of ''discharge of dredged material'' contained in our existing regulations. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule.

D. Regulatory Flexibility Act (RFA) as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, a small entity is defined as: (1) A small business based on SBA size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, we certify that this action will not have a significant economic impact on a substantial number of small entities. As explained in sections II and III of today's preamble, the rule does not alter or enlarge section 404 program jurisdiction and therefore does not change any discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the rule identifies what types of activities are likely to give rise to an obligation to obtain such a permit under the existing regulatory program. Moreover, we also do not anticipate that provision of project-specific information that a regulable discharge does not occur would result in significant costs.

E. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. As explained in sections II and III of today's preamble, the rule does not alter or enlarge section 404 program jurisdiction and therefore does not affect a discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the rule identifies what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of ''discharge of dredged material'' contained in our existing regulations. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reasons, we have determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's rule is not subject to the requirements of section 203 of UMRA.

F. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (the NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs us to use voluntary consensus standards in our regulatory activities unless to do so would be

inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

This rule does not involve technical standards. Therefore, we did not considering the use of any voluntary consensus standards.

G. Executive Order 13045

Executive Order 13045, entitled Protection of Children From Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Was initiated after April 21, 1997, or for which a notice of proposed rulemaking was published after April 21, 1998; (2) is determined to be ''economically significant'' as defined under Executive Order 12866, and (3) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets all three criteria, we must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives that we considered.

This final rule is not subject to Executive Order 13045 because it is not an economically significant regulatory action as defined by Executive Order 12866. As explained in sections II and III of today's preamble, the rule does not alter or enlarge section 404 program jurisdiction and therefore does not affect a discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the rule identifies what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of ''discharge of dredged material'' contained in our existing regulations. Furthermore, it does not concern an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children.

H. Executive Order 13084

Under Executive Order 13084, we may not issue a regulation that is not required by statute, if it significantly or uniquely affects the communities of Indian Tribal governments and imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance cost incurred by the Tribal governments, or we consult with those governments. If we comply by consulting, Executive Order 13084 requires us to provide the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of our prior consultation with representatives of affected Tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires us to develop an effective process permitting elected officials and other representatives of Indian Tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect the communities of Indian Tribal governments, nor does it impose significant compliance costs on them. As explained in sections II and III of today's preamble, the rule does not alter or enlarge section 404 program jurisdiction and therefore does not affect a discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the rule identifies what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of ''discharge of dredged material'' contained in our existing regulations. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

I. Environmental Documentation

As required by the National Environmental Policy Act (NEPA), the Corps prepares appropriate environmental documentation for its activities affecting the quality of the human environment. The Corps has made a determination that today's rule does not constitute a major Federal action significantly affecting the quality of the human environment, and thus does not require the preparation of an Environmental Impact Statement (EIS). One commenter expressed the view that an Environmental Impact Statement (EIS) was necessary for the rule. However, as we noted in the proposed rule's preamble, the Corps prepares appropriate NEPA documents, when required, covering specific permit situations. The implementation of today's rule would not authorize anyone (*e.g.,* any landowner or permit applicant) to perform any work involving regulated activities in waters of the U.S. without first seeking and obtaining an appropriate permit authorization from the Corps. As explained in sections II and III of today's preamble, the rule does not alter or enlarge section 404 program jurisdiction and therefore does not affect a discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the rule identifies what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of ''discharge of dredged material'' contained in our existing regulations. Accordingly, the Corps continues to believe an EIS is not warranted and has prepared an environmental assessment (EA) for the rule.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective February 16, 2001.

List of Subjects

33 CFR Part 323

Water pollution control, Waterways.

40 CFR Part 232

Environmental protection, Intergovernmental relations, Water pollution control.

Corps of Engineers

33 CFR Chapter II

Accordingly, as set forth in the preamble 33 CFR part 323 is amended as set forth below:

PART 323—[AMENDED]

1. The authority citation for part 323 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. Amend section 323.2 as follows:

a. In paragraph (d)(1) introductory text, remove the words ''paragraph

(d)(2)'' and add, in their place, the words ''paragraph (d)(3)''.

b. Redesignate paragraphs (d)(2) through (d)(5) as paragraphs (d)(3) through (d)(6), respectively.

c. Add new paragraph (d)(2).

d. In newly redesignated paragraph (d)(4), in the first sentence of paragraph (d)(4)(i) remove each time they appear the words ''paragraphs (d)(4) and (d)(5)'' and add, in their place, the words ''paragraphs (d)(5) and (d)(6)'', remove paragraph (d)(4)(iii), and redesignate paragraph (d)(4)(iv) as new paragraph (d)(4)(iii).

The addition reads as follows:

§ 323.2 Definitions.

* * * * *

(d) * * *

(2)(i) The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA.

(ii) *Incidental fallback* is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

* * * * *

Dated: January 8, 2001.

Joseph W. Westphal,

Assistant Secretary of the Army (Civil Works), Department of the Army.

Environmental Protection Agency

40 CFR Chapter I

Accordingly, as set forth in the preamble 40 CFR part 232 is amended as set forth below:

PART 232—[AMENDED]

1. The authority citation for part 232 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. Amend section 232.2 as follows:

a. In paragraph (1) introductory text of the definition of ''Discharge of dredged material'', remove the words ''paragraph (2)'' and add, in their place, the words ''paragraph (3)''.

b. In the definition of ''Discharge of dredged material'', redesignate paragraphs (2) through (5) as paragraphs (3) through (6), respectively.

c. In the definition of ''Discharge of dredged material'', add new paragraph (2).

d. In the first sentence of newly redesignated paragraph (4)(i) remove each time they appear the words ''paragraphs (4) and (5)'' and add, in their place, the words ''paragraphs (5) and (6)'', remove paragraph (4)(iii), and redesignate paragraph (4)(iv) as new paragraph (4)(iii).

The addition reads as follows:

§ 232.2 Definitions.

* * * * *

Discharge of dredged material * * *

(2)(i) The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA.

(ii) *Incidental fallback* is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

* * * * *

Dated: January 9, 2001.

Carol M. Browner,

Administrator, Environmental Protection Agency.

[FR Doc. 01–1179 Filed 1–16–01; 8:45 am]

BILLING CODE 6560–50–P

Issued in Washington, DC, on this 12th day of February 2001.

John Seal,

Acting Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 01–3881 Filed 2–14–01; 8:45 am]

BILLING CODE 7708–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

RIN 0720–AA62

Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) TRICARE, Partial Implementation of Pharmacy Benefits Program; Implementation of National Defense Authorization Act Medical Benefits for Fiscal Year 2001; Change in Effective Date

AGENCY: Office of the Secretary, Defense.

ACTION: Interim final rule.

SUMMARY: On Friday, February 9, 2001 (66 FR 9651), the Department of Defense published an Interim final rule on Partial Implementation of Pharmacy Benefits Program; Implementation of National Defense Authorization Act Medical Benefits for Fiscal Year 2001. This document is published to change the effective date of that rule in accordance with the statutory requirements of the National Defense Authorization Act for Fiscal Year 2001, which directed implementation of specific medical benefits on April 1, 2001.

EFFECTIVE DATE: The effective date of the rule is amended to April 1, 2001.

FOR FURTHER INFORMATION CONTACT: L.M. Bynum, 703–601–4722.

Dated: February 9, 2001.

L.M. Bynum,

Alternate OSD Federal Register Liaison, Department of Defense.

[FR Doc. 01–3788 Filed 2–14–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 323

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 232

[FRL–6945–3]

Further Revisions to the Clean Water Act Regulatory Definition of ''Discharge of Dredged Material'': Delay of Effective Date

AGENCIES: Army Corps of Engineers, Department of the Army, DOD; and Environmental Protection Agency.

ACTION: Final Rule; Delay of Effective Date.

SUMMARY: In accordance with the memorandum of January 20, 2001, from the Assistant to the President and Chief of Staff, entitled ''Regulatory Review Plan,'' published in the **Federal Register** on January 24, 2001, this action temporarily delays for 60 days the effective date of the rule entitled ''Further Revisions to the Clean Water Act Regulatory Definition of 'Discharge of Dredged Material','' published in the **Federal Register** on Wednesday, January 17, 2001, at 66 FR 4549. That rule amends Clean Water Act section 404 regulations defining the term ''discharge of dredged material.''

DATES: The effective date of Further Revisions to the Clean Water Act Regulatory Definition of ''Discharge of Dredged Material,'' amending 33 CFR part 323 and 40 CFR part 232, published in the **Federal Register** on Wednesday, January 17, 2001, at 66 FR 4549, is delayed for 60 days, from the original February 16, 2001, effective date to a new effective date of April 17, 2001.

FOR FURTHER INFORMATION CONTACT: For information on today's action, contact either Mr. Michael Smith, U.S. Army Corps of Engineers, ATTN: CECW-OR (3F73), 441 ''G'' Street, NW, Washington, DC 203140–1000, phone: (202) 761–4598, or Cynthia Puskar, U.S. Environmental Protection Agency, Office of Water (4201), 1200 Pennsylvania Avenue N.W., Washington, DC 20460, phone: (202) 260–8532.

SUPPLEMENTARY INFORMATION: To the extent that 5 U.S.C. 553 applies to this action, it is exempt from notice and comment because it constitutes a rule of procedure under 5 U.S.C. 553(b)(A). Alternatively, the agencies' implementation of this action without opportunity for public comment, effective immediately upon publication today in the **Federal Register**, is based on the good cause exceptions in 5 U.S.C. 553(b)(B) and 553(d)(3). Seeking public comment is impracticable, unnecessary and contrary to the public interest. The temporary 60-day delay in effective date is necessary to give EPA and Corps officials the opportunity for further review and consideration of new regulations, consistent with the Assistant to the President's memorandum of January 20, 2001. Given the imminence of the effective date, seeking prior public comment on this temporary delay would have been impractical, as well as contrary to the public interest in the orderly promulgation and implementation of regulations. The imminence of the effective date is also good cause for making this rule immediately effective upon publication.

Dated: February 9, 2001.

Claudia L. Tornblom,

Deputy Assistant Secretary of the Army (Management and Budget), Department of the Army.

Dated: February 12, 2001.

Christine T. Whitman,

Administrator, Environmental Protection Agency.

[FR Doc. 01–3843 Filed 2–14–01; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL–6927–2]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency (EPA)

ACTION: Partial direct final deletion of the California Gulch Superfund Site from the National Priorities List (NPL).

SUMMARY: The Environmental Protection Agency (EPA) Region 8 announces its intent to delete Operable Unit 10 (OU 10) of the California Gulch Superfund Site (Site) from the National Priorities List (NPL) and requests public comment on this action. The NPL constitutes Appendix B of 40 CFR Part 300, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which EPA promulgated pursuant to Section 105 of the Comprehensive Environmental Response,